

Indiana Law Review



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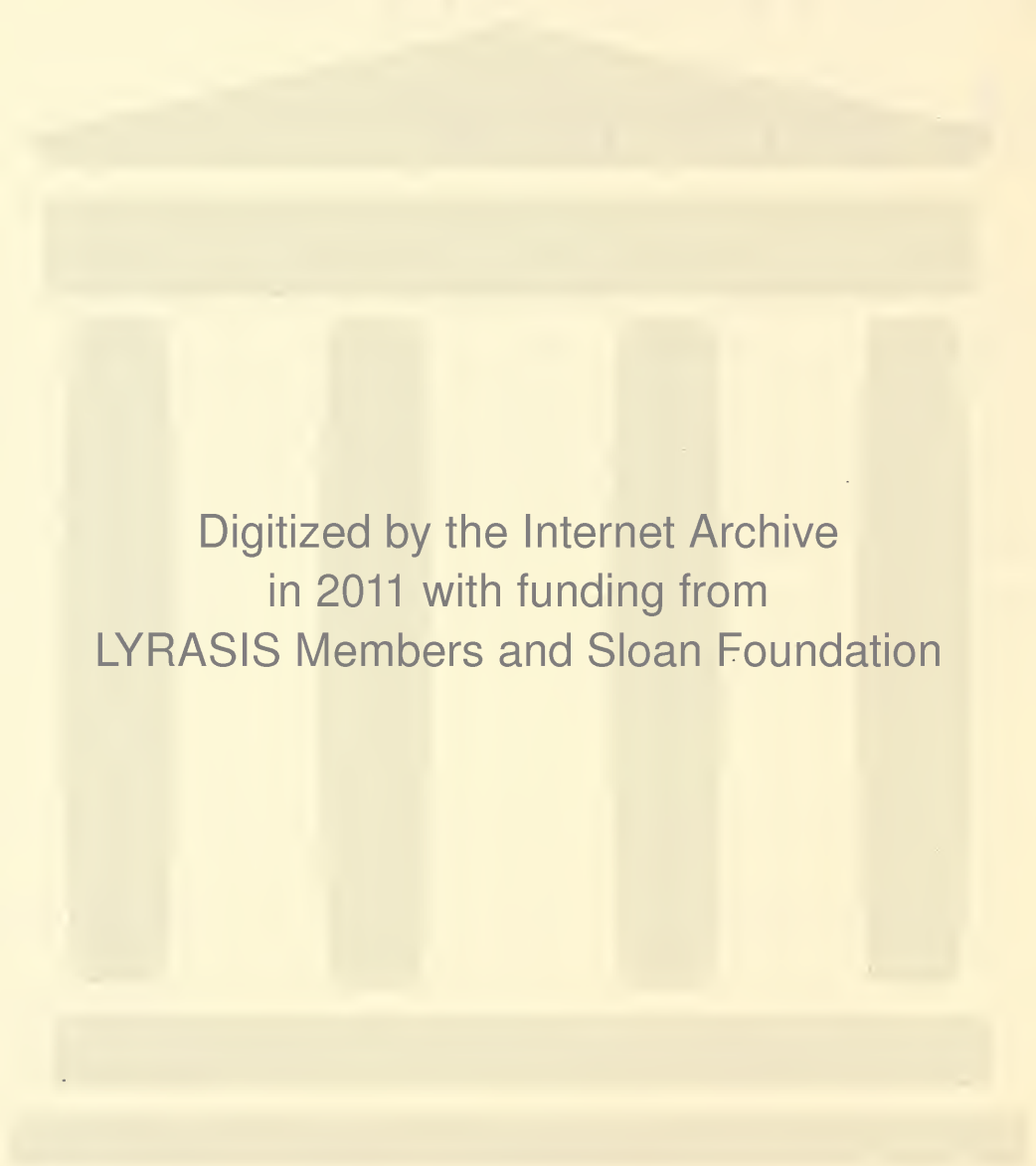
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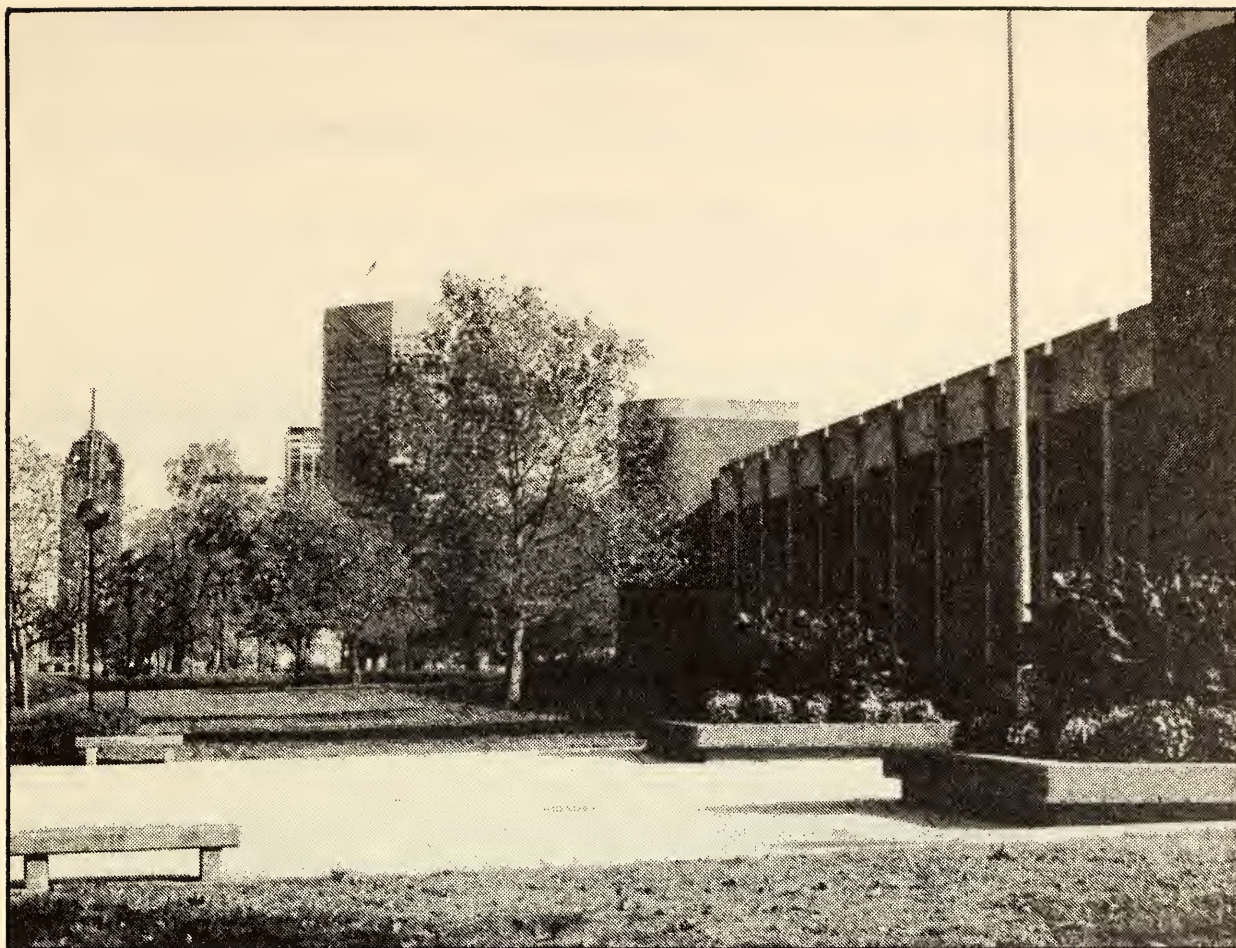
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A NOTE TO OUR READERS

On April 17, 1998, the Program on Law and State Government and the *Indiana Law Review* sponsored a symposium entitled, "National Power and State Autonomy: Calibrating the New "New Federalism." The symposium was held in the Chamber of the House of Representatives at the Indiana State House. The purpose of the symposium was to provide lawyers, professors, judges, and policy-makers an opportunity to learn about decisions recently handed down by the United States Supreme Court and the resulting balance of federalism.

The *Indiana Law Review* is honored to publish this symposium. We have included an introduction to the symposium and the luncheon address in the hope of further sharing the spirit of the conference with our readers. We hope you will find the printed version as educational and thought-provoking as the live symposium.

—The Editors

Indiana Law Review

Volume 32

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Number 1

SYMPOSIUM: NATIONAL POWER AND STATE AUTONOMY: CALIBRATING THE NEW "NEW FEDERALISM"

CYNTHIA A. BAKER*
JONATHAN D. MATTINGLY**

INTRODUCTION

In 1819, Chief Justice John Marshall addressed the balance between the power of the federal government and that of its member states in authoring the celebrated opinion of *McCulloch v. Maryland*. Chief Justice Marshall, speaking for the United States Supreme Court, set the terms of the debate about federalism and held that the federal government "is the government of all; its powers are delegated by all; it represents all, and acts for all." In doing so, Chief Justice Marshall noted that the question of federalism is "perpetually arising, and will probably continue to arise, as long as our system shall exist."

History has proven Chief Justice Marshall's prediction correct. Federalism questions are a recurring source of major constitutional and political issues. In fact, the United States Supreme Court has recently addressed the "perpetually arising" question of federalism in a number of decisions, including *Printz v. United States*, *Idaho v. Coeur d'Alene Tribe*, and *City of Boerne v. Flores*. Today's symposium, "National Power and State Autonomy: Calibrating the New 'New Federalism,'" will explore the present and future effects of these decisions on the balance of federalism in the context of the United States Constitution, Supreme Court precedent, governmental structure, and public policy.

The symposium will begin with an overview of the historical and doctrinal context for the recent developments in federalism and continue with three academic sessions, each of which will explore decisions recently handed down by the United States Supreme Court and the balance of federalism left in their wake. The symposium also features a luncheon address from the Honorable Jeffrey Modisett, Attorney General of Indiana. Participation in the symposium promises guests the opportunity to hear nationally renown academics discuss how federal, state, and local governments are affected by recent changes in federalism. The Program on Law and State Government and the *Indiana Law Review* thank you for joining us in the Chamber of the Indiana House of Representatives to learn how the United States Supreme Court's recent calibration of federalism impacts us all.

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-INTRODUCTORY REMARKS-

ENUMERATED AND RESERVED POWERS: THE “PERPETUALLY ARISING QUESTION”

JAMES W. TORKE*

My assignment is to provide a context, or set the stage, for the principal papers and commentary which follow. Our topic is federalism, or the new federalism, or, to be precise, the new “new federalism.” Whichever—and, of course, they are all part of one whole—I hope I can impart an enthusiasm for the topic for it is, to my mind, the most intriguing of the several topics which make up the broad field of American constitutional law. And, aside from any peculiarities of my intellectual tastes, certainly federalism—which is, of course, making something of a comeback as our symposium witnesses—is one of the master issues of our constitutional system. So, I welcome our topic.

This matter of “our federalism,”¹ as Justice Harlan liked to ennoble this concept, is, of course, very complex; but the central question can be stated easily enough: What is the proper balance of power between the national and the state governments? Or, in the terms of our symposium’s title: What is the proper balance between the enumerated powers of the national government and the autonomy of the states? I tend to think of this question as a question of the vertical separation of powers, but perhaps that model, setting one seat of authority above the other, gives the game away, reveals the modern bias which is to some extent under challenge from the new “new federalism.”²

I take my text from John Marshall’s elegant formulation of the issue in *McCulloch v. Maryland*:

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.³

Now this struggle for power between the national and state governments occurs at many points, but the principal battles have taken place upon the fields

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1. E.g., *Reynolds v. Sims*, 377 U.S. 533, 624 (1966) (Harlan, J., dissenting); *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

2. Of course, by virtue of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the national government is supreme within its sphere, but beyond its sphere the states presumably hold sway.

3. 17 U.S. (4 Wheat.) 315, 404 (1819).

of the Commerce Clause,⁴ the Tenth Amendment,⁵ and the last section of the Fourteenth Amendment.⁶ It is upon these sites that our speakers principally will focus today.

For lawyers, the story of the ebb and flow of national power is a familiar one. We constitutional law types rehearse it every year like an old saga. One version of it is so familiar that the scholar Bruce Ackerman has dubbed it the "bicentennial myth" or dominant "constitutional narrative."⁷ One of the most effective tellings of at least the first part of this "bicentennial myth" was by Professor, later Justice, Felix Frankfurter in a series of lectures which he gave in 1936 in the midst of the crisis of the New Deal and the Supreme Court. These lectures were later published under the title, *The Commerce Clause Under Marshall, Taney, and Waite*,⁸ one of the classic texts of our constitutional culture. In effect, Frankfurter's lectures amounted to an adversarial brief, which takes on a special cogency because of its scholarly guise, in behalf of that view of national power which the Roosevelt administration had until then been unsuccessfully urging on the courts. What he portrayed was "a coherent evolutionary process" of constitutional interpretation that began with John Marshall, was carried on by Roger Taney, and ended with the Chief Justiceship of Morrison Waite in 1888. By beginning the tale with Marshall, he was, of course, suggesting that proper understanding begins with him. While acknowledging that "no judge writes on a wholly clean slate,"⁹ Professor Frankfurter goes on to contend that Marshall, when called upon to apply the Commerce Clause had available "no fund of mature or coherent speculation,"¹⁰ no "current of important thought,"¹¹ and "no constructive criticisms"¹² from either the 1787 Convention or the ratification debates, upon which to draw. And by stopping with Waite, Frankfurter could maintain his apparent distance as a disinterested scholar. Yet it was obvious to any informed reader that, in Frankfurter's view, after 1888, the Court went astray. From then on, the Court turned from the truth, and wandered under the spell of *laissez faire* theory in a

4. U.S. CONST. art. 1, § 8, cl. 3 ("The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."). This and other specific grants of power are, of course, enhanced by the supportive power given by the Necessary and Proper Clause. *Id.* cl. 18.

5. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

6. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

7. BRUCE A. ACKERMAN, *WE THE PEOPLE*, FOUNDATIONS 34-35 (1991).

8. FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (Peter Smith, ed., 1978).

9. *Id.* at 12.

10. *Id.*

11. *Id.*

12. *Id.*

wilderness of error.¹³

Some years later Professor Wallace Mendelson added a coda to the story which Frankfurter had told. In an introduction to Frankfurter's text, he wrote: "After a brave effort to confine the New Deal, the old Court surrendered to the Marshall-Taney-Waite view of national power."¹⁴ Writing in 1964, Mendelson noted that since that famous capitulation, no federal act passed under Congress' Commerce power had been invalidated by the Court. In short, it seemed that the story of the vicissitudes of the commerce power had been wrapped up in the early forties with the *Darby*¹⁵ and *Filburn*¹⁶ cases. In the latter, a unanimous Court sanctioned an exercise of Congress's power that seemed to reach into a farmer's kitchen flour bin. In *Darby*, Justice Stone famously concluded that the Tenth Amendment "states but a truism that all is retained which has not been surrendered."¹⁷ The Tenth Amendment was thus revealed as but a residue, the substance of which could be determined, as with a residuary clause in a will, only after the specific bequests had been measured.

I can recall that in my days as a law student the tale of the Commerce power seemed pretty much told. My constitutional law teacher, a veteran of the New Deal struggle—he had worked in the Solicitor General's office—spoke to us of a war won and over with. Even in my early days as a law teacher, attention to the standard story of the rise, fall, and rise of the national power was apt to be justified as an exercise in constitutional history, an illustration of settled doctrine. The notion that the Tenth Amendment might ever rise again from Justice Stone's *Darby* malediction was the hope only of crackpots and cranks.

A somewhat parallel tale can be told of the evolution of Congressional powers under the enabling sections of the Civil War Amendments.¹⁸ This story is not so long and had not been thought to have quite reached an end, although a good many thought they could guess the ending. From a restrictive reading in the *Civil Rights Cases*¹⁹ of 1883, the scope of Congressional authority was gradually expanded—an expansion propped up in part by drawing upon Marshall's broad view of national power in *McCulloch*.²⁰ By 1965 Congress was deemed able to reach certain types of private conspiracies against civil rights and to regulate behavior not itself violative of the substantive portions of the amendments. Congress, it was even hinted, might adjust—upwardly only—the substantive protections of the amendments themselves.²¹

13. See *id.* at 46-114.

14. *Id.* at 116.

15. *United States v. Darby*, 312 U.S. 100 (1941).

16. *Wickard v. Filburn*, 317 U.S. 111 (1942).

17. *Darby*, 312 U.S. at 124.

18. U.S. CONST. amends. XIII-XV.

19. 109 U.S. 3 (1883).

20. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (noting the establishment of Congress' broad powers under the Necessary and Proper clause established in *McCulloch*).

21. See, e.g., *United States v. Guest*, 383 U.S. 745, 754-55 (1966). The Court stated:

But even from his remote vantage, Marshall proved more prescient than most mid-Twentieth Century commentators. As he forewarned, questions “respecting the extent of the powers actually granted” to Congress, and of “the conflicting powers of the general and state governments” are, indeed, “perpetually arising, and will probably continue to arise, so long as our system will exist.”²²

There are, of course, many ways to divide up constitutional history. Until 1976 at least, the standard approach, Professors Frankfurter and Mendelson’s version, had three chapters: Chapter One told of the era from Marshall through Waite, in which the scriptures regarding the powers of Congress were unfolded according to their true meaning; in Chapter Two, we learned of the period in the wilderness²³ which lasted until 1937; Chapter Three picks up to lead us through the final era in which the truth was rediscovered²⁴ and the nation set once again on a proper course. But now, it seems, a new story is being told which extends the “bicentennial myth”²⁵ both backwards and forwards in time. First, there has been added a new prologue built on a rich lode of writings from the revolutionary and ratification eras, the times before Marshall which Frankfurter had found so barren.²⁶ Second, both the political and legal atmosphere have changed so that the old story has been resurrected. It has turned out that it was not over, it was just hibernating. The Tenth Amendment has been given a new

[W]e therefore deal here only with the bare terms of the Equal Protection Clause itself, nothing said in this opinion goes to the question of what kinds of other broader legislation Congress might constitutionally enact under Section 5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.

Id. See, e.g., also *Morgan*, 384 U.S. at 648 (quoting *Ex parte Com. of Virginia*, 100 U.S. 339 (1879), “It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.”); but see *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) (“In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States’ powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.”).

22. *McCulloch*, 17 U.S. (4 Wheat.) at 404.

23. The standard story of “Chapter Two” is told effectively in Paul Kens, *Dawn of the Conservative Era*, VOL. I, 1997 J. SUP. CT. HIST. 1, and Benno C. Schmidt, *The Court in the Progressive Era*, VOL. I, 1997 J. SUP. CT. HIST. 14. For a somewhat revisionist look at the era, see Hadley Arkes, *A Return to the Four Horsemen*, VOL. I, 1997 J. SUP. CT. HIST. 33.

24. The cases in which the Court rediscovered its way are ordinarily thought to be *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the latter dealing with state regulatory authority over the economy.

25. See FRANKFURTER, *supra* note 8, at 12.

26. See, e.g., Martin S. Flaherty, *More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 U. KAN. L. REV. 993 (1997) (discussing the impact of the American Revolution on federalism principles); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) (discussing the foundation of federalism found in writings from the ratification process).

body.

It is a little ironic that the so-called “bicentennial myth” should begin to unravel in the bicentennial year. The latest chapter begins in 1976 with the *National League of Cities v. Usery*²⁷ decision in which a bare majority held that application of the Fair Labor Standards Act²⁸ to state employees trenching upon certain integral aspects of state sovereignty protected by the Tenth Amendment.²⁹ If this decision did not immediately bear fruit in subsequent cases,³⁰ it caused a storm of protest. Justice Brennan, in an apoplectic dissent, called the decision “pernicious,”³¹ a “catastrophic judicial body blow.”³² For most commentators, it was, at best, an unwelcome atavism.³³ In fact, less than ten years later, it appeared that the heresy had been rooted out when another bare majority—made possible by Justice Blackmun’s jump to the other side—overturned *National League*, explaining that the proper safeguards of federalism were to be found not in the courts but in political structure and process.³⁴ Finding himself once again dissenting, Justice Rehnquist closed with this prophecy: “I do not think it

27. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Auth.*, 469 U.S. 528 (1985).

28. The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994).

29. *National League of Cities*, 426 U.S. at 851-52.

30. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (holding that the “extension of the [Age Discrimination in Employment Act] to cover state and local governments was a valid exercise of Congress’s powers”); *FERC v. Mississippi*, 456 U.S. 742, 759 (1982) (holding that the Public Utility Regulatory Policies Act authorizing the Federal Energy Regulatory Commission to exempt qualified power facilities from state laws and regulations was a valid exercise of Congress’ powers); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 690 (1982) (holding that Congress’ regulation of a state owned railroad under the Railway Labor Act was a valid exercise of Congress’ powers because it did not undermine the role of the states in our federal system); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981) (holding that the Surface Mining Act did not violate the Tenth Amendment).

31. *National League of Cities*, 426 U.S. at 860 (Brennan, J., dissenting).

32. *Id.* at 880.

33. See, e.g., Sotirios A. Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 161 (commenting, “If anything seemed settled in contemporary American constitutional law, it was the meaning of the Tenth Amendment.”); Bernard Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115, 1115 (1978) (commenting, “Like Hamlet’s father, state sovereignty is a ghost that refuses to remain in repose.”). A few commentators, however, saw some virtues in the decision. See, e.g., Robert F. Nagel, *Federalism As A Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 81 (stating, “My major purpose is not to insist that *Usery* was ultimately ‘correct,’ but to suggest that the inability to understand *Usery* demonstrates the extent to which the capacity to appreciate some important constitutional principles is being lost.”); Andrej Papaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 341 (implying that *National League of Cities v. Usery* may have provided a federalism framework from which to work).

34. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-56 (1985).

incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”³⁵

Rehnquist proved as prescient as Marshall. Within little more than a decade, in a trio of cases—*Gregory v. Ashcroft* in 1991,³⁶ *New York v. United States* in 1992,³⁷ and *Printz v. United States* in 1997³⁸—the spirit of *National League* was reborn. Once again, the Tenth Amendment was seen as reservoir of reserved powers and immunities which could be described, at least in part, independently of Congress’ enumerated powers.³⁹ The reconfiguration of the federal balance emerged as well in what for some were even more unexpected places. In *United States v. Lopez*,⁴⁰ the Court for the first time in over sixty years found a limit to Congress’ power over commerce inhering in the Commerce Clause itself.⁴¹ Even the mysterious Eleventh Amendment was refurbished in a manner that enhanced state sovereignty.⁴² Finally, in *City of Boerne v. Flores*,⁴³ the Court struck down the immensely popular Religious Freedom Restoration Act⁴⁴ as being in excess of Congress’ authority under the Fourteenth Amendment.⁴⁵

The Court, of course, has not been alone in its renewed concern for the federal balance; perhaps it is has been as much follower as leader. What during the Reagan era had, under the catch phrase, “the New Federalism,” seemed more political rhetoric than substantive policy, has today become a policy polestar.⁴⁶ Federalism is back in town!

Is this a good thing, a long-needed corrective to the burgeoning of national power? Or is it merely a momentary, impractical, and wrong-headed reaction—even, in the minds of some, a masked form of racial politics? As I began, let me say again that this is a very complex topic—as a matter of policy and as a matter of constitutional law. Nor do I suppose we are even now writing

35. *Id.* at 580 (Rehnquist, J., dissenting).

36. 501 U.S. 452 (1991).

37. 505 U.S. 144 (1992).

38. 117 S. Ct. 2365 (1997).

39. *See New York*, 505 U.S. at 155-56.

40. 514 U.S. 549 (1995).

41. *Id.* at 557-59.

42. *See Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997) (finding a state immune from suit brought by an Indiana tribe because of the Eleventh Amendment); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (finding that Congress did not have the power under the Indian Commerce Clause to abrogate the states’ immunity from suit under the Eleventh Amendment).

43. 117 S. Ct. 2157 (1997).

44. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

45. A five-justice majority concluded that “RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.” *City of Boerne*, 117 S. Ct. at 2172. In concurrence, Justice Stevens found the act also violated the Establishment Clause, U.S. CONST., amend. I. *Id.* (Stevens, J., concurring).

46. *See, e.g., Unfunded Mandate Reform Act of 1995*, 2 U.S.C. §§ 1501-1571 (Supp. I 1995).

the final chapter. If we will think, for a moment, of the Constitution as a landscape with geopolitical significance, we can see that our topic today concerns one of those borderlands where, as Marshall said, there will always be skirmishes and battles. At any point in time, however, there are three main issues for consideration: (1) What does a new "New Federalism" have to offer us in the Twenty-first Century? Is it but a vestige of what, two hundred years ago, was only a necessary political compromise? Or, has it intrinsic value for us today? John Yoo sees a need for a coherent theory of federalism which expresses the normative values which underlie it;⁴⁷ (2) What, both as a matter of law and as a matter of wise policy, ought to be the nature of the balance? Martin Redish explores the relationship between national power and state courts after *Printz*.⁴⁸ Attorney General Modisett describes the effects of the "new federalism" from the standpoint of a state policy-maker.⁴⁹ Ronald Rotunda focuses on Congress' power under the Fourteenth Amendment after the *City of Boerne* decision;⁵⁰ (3) Whose job is it to police the federal balance? Does the court have a role? Or, as Justice Blackmun argued in 1985,⁵¹ is it a matter to be left to the political structure and process? John Yoo makes the case for a central judicial role in the maintenance of the federal balance.⁵² The articles and comments which follow shed new light on these questions.

47. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998).

48. *Printz v. United States*, 117 S. Ct. 2365 (1997); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998).

49. Jeffrey A. Modisett, *Discovering the Impact of the "New Federalism" on State Policy Makers: A State Attorney General's Perspective*, 32 IND. L. REV. 141 (1998).

50. Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998).

51. Perhaps the definitive argument is Jesse H. Choper's, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

52. Yoo, *supra* note 47, at 41-42.

LISTENING TO THE “SOUNDS OF SOVEREIGNTY” BUT MISSING THE BEAT: DOES THE NEW FEDERALISM REALLY MATTER?

RONALD J. KROTOSZYNSKI, JR.*

“Meet the new boss, same as the old boss.”¹

INTRODUCTION

Professor Yoo offers a compelling case for the proposition that the Supreme Court is back in the business of reviewing federal legislation for consistency with the mandates of the Tenth Amendment.² He also offers sound reasons for rejecting—or at least really distrusting—the premises that undergird the “political safeguards” theory of the Tenth Amendment, exemplified by *Garcia v. San Antonio Metropolitan Transit Authority*.³ In addition, Professor Yoo musters sound policy rationales and historical imperatives for charging the judiciary with protecting the states’ autonomy as independent political entities.⁴ Yoo’s position has much to recommend it and merits careful consideration by both judges and legal academics.

In the end, however, I am unconvinced that in practice the judicial enforcement of the Tenth Amendment will alter the balance of power between the federal and state governments. Congress retains a veritable arsenal of constitutional powers with which to corrupt even the most virtuous state government.⁵ Not unlike the serpent in the Garden of Eden,⁶ Congress routinely tempts state governments with a variety of forbidden fruits.⁷ Not unlike Adam

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1. PETE TOWNSEND, *Won't Get Fooled Again, on WHO'S NEXT* (MCA Records 1971).

2. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 27-28 (1998); see also John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) [hereinafter *Judicial Safeguards*].

3. 469 U.S. 528 (1985).

4. Yoo, *supra* note 2, at 42-44.

5. On the other hand, Professor Malloy suggests that the arsenal may be shrinking more rapidly than many observers realize. S. Elizabeth Wilborn Malloy, *Whose Federalism?*, 32 IND. L. REV. 45, 47-48, 49-56, 67-69 (1998).

6. *Genesis* 3.

7. *Compare* South Dakota v. Dole, 483 U.S. 203, 211-12 (1987) (holding that Congress may condition the receipt of federal highway funds on the “voluntary” modification of state laws defining the age at which a person may lawfully purchase, possess, and consume alcoholic beverages), with U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”). At least arguably, it would seem that the

and Eve, state governments take the bait, the consequences be damned.⁸

There is a second, perhaps more cynical, reason for concern about the Supreme Court's new federalism jurisprudence. One could reasonably argue that federalism *du jour* merely serves as a convenient shill for the policy preferences of the current members of the Supreme Court.⁹ In Professor Wechsler's terms, may we expect the current working majority to fashion and consistently apply "neutral principles" to govern the application of the new federalism?¹⁰ Only time will provide a firm answer, but I harbor some rather serious doubts on this front.

Part I of this Essay addresses whether the Supreme Court's recent efforts to reestablish federalism as a bulwark against the inexorable expansion of federal powers is likely to succeed in resetting the balance in favor of greater state autonomy. For various reasons, it seems doubtful that the Supreme Court will succeed in any meaningful sense. Although it may manage to limit somewhat the immediate means that Congress may use to impose its will on the states, Congress will not face much difficulty in continuing to implement its ends. In the final analysis, a meaningful federalism must be a federalism based on ends, not means. To date, the Supreme Court has failed to display any recognition of—much less sensitivity to—this state of affairs.

Part II offers an alternative account of the contemporary Supreme Court's efforts to breathe new life into its federalism doctrines. Given the inefficacy of the current new federalism as a means of providing meaningful checks on congressional micromanagement of the states or usurpation of traditional state authority, Part II posits that the new federalism might simply reflect a means for the Justices to implement policy preferences without having to couch those preferences in substantive law terms. Arguably, the new federalism represents nothing more than a more palatable means of *Lochnerizing*¹¹ legislation that a majority of the justices do not find congenial. Rather than deploying substantive due process as the assassin of federal health, safety, and morals legislation, the Tenth Amendment can do in stealth what the Due Process Clause once did in the open light of day.¹²

Finally, in the conclusion, I argue that Professor Yoo's call for a revitalized

Twenty-first Amendment vests the states—not the federal government—with rather basic decisional authority over the regulation of intoxicating beverages. For better or worse, the Twenty-first Amendment afforded South Dakota scant constitutional protection when matched against the awesome taxing and spending powers vested in the federal Congress.

8. See William W. Van Alstyne, "Thirty Pieces of Silver" *For the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303 (1993).

9. See Malloy, *supra* note 5, at 45-47, 62-68.

10. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10-20 (1959); see also JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 54-55 (1980).

11. *Lochner v. New York*, 198 U.S. 45 (1905).

12. See generally Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 560-67 (1997); Malloy, *supra* note 5, at 45-47.

federalism as a means of securing liberty through divided government makes a great deal of sense. For federalism to serve as the guardian of liberty, however, federalism must be principled and as much about ends as it is about means. The current means-based federalism does not serve this role and is, at least arguably, as much the enemy of individual liberty as it is its friend.

I. ON MEANS, ENDS, AND RECOGNIZING THE DIFFERENCE

Professor Yoo posits, quite persuasively, the unmourned death of *Garcia*.¹³ Much like the mad wife burned alive in Charlotte Brontë's *Jane Eyre*,¹⁴ *Garcia* appears to have died a horrible, but suitably inconspicuous, death. That the Supreme Court has not bothered to provide a requiem or decent internment of the decision is of no moment. It seems reasonably clear that a current working majority of the Supreme Court will no longer rely on the good graces of Congress to enforce the principles of federalism. The "political safeguards" theory of the Tenth Amendment has been unceremoniously tossed upon the ash heap of constitutional law history.¹⁵

Moreover, this marks a milestone in the modern Supreme Court's federalism jurisprudence. For the first time since the New Deal revolution,¹⁶ the Supreme Court has signaled that Congress' nationalizing powers might be finite. That said, one cannot help but wonder whether these decisions really represent a meaningful commitment to a new, revitalized federalism.

The Supreme Court certainly has established some limits on the ability of Congress to order state officers about directly. *Printz*,¹⁷ *Boerne*,¹⁸ *Lopez*,¹⁹ and, indeed, even earlier cases like *New York v. United States*²⁰ and *Gregory v. Ashcroft*²¹ plainly indicate that state officials are not at the *direct* beck and call of the federal government.

13. Yoo, *supra* note 2, at 27-28, 41-42.

14. CHARLOTTE BRONTË, *JANE EYRE* (Octopus Books Ltd. 1980) (1847).

15. This would appear to be an entirely appropriate fate for *Garcia*, at least from Professor Yoo's perspective. Yoo, *supra* note 2, at 27-28, 42-43; *see also* *Judicial Safeguards*, *supra* note 2, at 1334.

16. *See* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 108-30 (1991).

17. *Printz v. United States*, 117 S. Ct. 2365, 2383 (1997) (declaring unconstitutional the Brady Act's requirement that state officials conduct "background checks" before permitting the sale of firearms).

18. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (holding the Religious Freedom Restoration Act of 1993 unconstitutional on federalism grounds).

19. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress' Commerce Clause authority).

20. 505 U.S. 144, 174-76 (1992) (holding unconstitutional a provision of the Low-Level Radioactive Waste Policy Act, which required states to "take title" to waste not disposed of according to federal standards).

21. 501 U.S. 452, 470 (1991) (holding that the mandatory retirement age for Missouri state judges was exempt from Federal Age Discrimination Employment Act).

The question remains, however, whether these decisions demarcate a meaningful limiting principle. At least arguably, the Supreme Court largely has failed to articulate a coherent theory of federalism that explains the discrete results reached in particular cases and that would facilitate reasonably accurate predictions regarding the probable results in future cases. Indeed, the Supreme Court has failed not only to articulate a meaningful vision for federalism; its scattershot efforts to reestablish sound principles of federalism do not represent either a coherent or an effective bulwark against the centralizing machinations of the federal government.

A hypothetical will help to illustrate these concerns. Suppose that Congress decided to seek the “voluntary” assistance of state officials in achieving a particular federal objective. Suppose further that the federal objective lies (at best) in the twilight of the enumerated Article I powers—that Congress itself has deep misgivings about its constitutional authority to establish a uniform federal rule regarding the matter in question. For the sake of argument, let us suppose that Congress deems it undesirable for state highway commissioners to be elected, rather than appointed, on the theory that requiring highway commissioners to seek election opens the door to all forms of corruption, cronyism, and related mischief.

The Supreme Court’s most recent Commerce Clause and Tenth Amendment cases suggest that Congress probably would not succeed in directly imposing its preference on the states. A congressional directive to reorder the basic political structure of a state would be beyond the constitutional pale or, perhaps more accurately, at least five sitting Justices are likely to so view the matter.²² Moreover, the hypothetical plainly contemplates a direct congressional order demanding compliance from a number of state officials, including the governor and state legislature, and perhaps the state supreme court.²³ Under the authority of *City of Boerne*²⁴ and *New York v. United States*,²⁵ this scheme would almost certainly fail.²⁶

Let us now modify the hypothetical. Suppose that instead of directly

22. See, e.g., *New York v. United States*, 505 U.S. 144, 161-62, 175-77 (1992) (rejecting the proposition that Congress may directly command state personnel to implement a federal legislative command); *South Dakota v. Dole*, 483 U.S. 203, 215-16 (1987) (O’Connor, J., dissenting) (rejecting as preposterous the proposition that Congress could deploy the taxing and spending power to induce a state government to relocate its state capital).

23. Some state constitutions both establish certain state offices and authorize or require the election of these state officers, which presumably could include state highway commissioners. See, e.g., LA. CONST. art. 4, § 21; MO. CONST. art. IV, § 29. In other states, statutes might require the election of state highway commissioners. See, e.g., MISS. CODE ANN. § 65-1-3 (Supp. 1998). See also N.H. REV. STAT. ANN. §§ 231:62, 669:15 (Supp. 1997) (providing for the election of local “Highway Agents” in every town within the state).

24. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

25. 505 U.S. 144 (1992).

26. See *supra* text accompanying notes 18-20; see also *Judicial Safeguards*, *supra* note 2, at 1334-57.

commanding the result that it desires, i.e., the appointment of all state highway commissioners, Congress instead conditions receipt of federal highway funds on such an arrangement, by simply inserting a suitable rider in the next Intermodal Surface Transportation Efficiency Act ("ISTEA").²⁷ If a state wishes to retain an elected state highway commission, it is certainly free to do so. Such a decision, however, would have the unfortunate repercussion of precluding the state from receiving any federal highway funds.²⁸

The contemporary Supreme Court has made absolutely no effort to reconcile its Commerce Clause or Tenth Amendment holdings with the "blank check" approach it has established regarding limitations on Congress' taxing and spending powers. Indeed, Chief Justice Rehnquist, one of the principal authors of the Supreme Court's new federalism decisions,²⁹ wrote the opinion of the Court in *South Dakota v. Dole*,³⁰ a decision that vests Congress with virtually unfettered discretion to spend federal monies on projects it deems worthwhile and, moreover, to condition such spending as it thinks best.³¹ Significantly, in *Dole* "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately

27. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified as amended at scattered sections of titles 3-6, 16, 23 U.S.C.). Congress passed the most recent such legislation on May 29, 1998, providing "more than \$200 billion in transportation money in the next six years." Vicki Hyman, *Sagging Airport Runway Slated for Asphalt Job*, TIMES-PICAYUNE, June 1, 1998, at A1, A6; see also *What Congress Missed When It Hit the Highway (Bill)*, WASH. POST, June 14, 1998, at C5; Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998). Congress could easily condition the receipt of such funds on maintaining an acceptable form of state oversight for the use and distribution of the funds.

28. Cf. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 142-43 (1947) (holding that Congress could condition receipt of federal highway funds on prohibition against appointed state highway commissioners engaging in partisan political activities).

29. See *United States v. Lopez*, 514 U.S. 549 (1995).

30. 483 U.S. 203 (1987).

31. *Id.* at 206-12. According to Chief Justice Rehnquist, "objectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Id.* at 207. The spending power is not unlimited—congressional appropriations must in some fashion promote "the general welfare," i.e., they must "serve general public purposes." *Id.* This limitation is in practice quite meaningless: "[C]ourts should defer substantially to the judgment of Congress" and the federal judiciary's "level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." *Id.* at 207 & n.2. Conditional federal spending must meet three additional requirements: (1) a conditional offer must be plainly identified to the states as such, (2) the condition placed upon the grant must be in some fashion "related" to a federal interest in "particular national projects or programs," and (3) the condition may not require the states to transgress an otherwise applicable constitutional limitation. See *id.* at 207-08. In the case of the national minimum drinking age, the Supreme Court found that Congress had satisfied all four conditions. See *id.* at 208-12.

placed on federal grants.”³²

To paraphrase Professor Rosenthal, now that the “front door” of plenary regulatory power pursuant to the Commerce Clause appears to be swinging shut, it is now necessary to consider whether the Supreme Court will also move to close and bar the “back door” represented by the federal spending power.³³ Professor Baker has aptly noted that even in an era of contracting federal commerce powers, “if the Spending Clause is simultaneously interpreted to permit Congress to seek otherwise forbidden regulatory aims indirectly through a conditional offer of federal funds to the states, the notion of a ‘federal government of enumerated powers’ will have no meaning.”³⁴ Professor Yoo acknowledges, at least in passing, the potential threat that an unlimited conditional spending power poses to federalism.³⁵

The dimension of the problem is large, at least if one is committed to maintaining a meaningful form of federalism, a federalism in which the states are to retain some measure of self-determination. Nevertheless, “[t]he Court’s decisions in cases challenging conditions on federal funds offered the states, unlike its resolution of challenges to conditions on benefits that the government offers individuals, are strikingly consistent: the Court has never invalidated such an enactment.”³⁶

Chief Justice Rehnquist’s opinion in *Dole* reflects a consistent theme in his constitutional jurisprudence: the idea that government may condition the grant of a boon on the surrender of a constitutional right or privilege. In the Chief Justice’s world, one always must be prepared to “take the bitter with the sweet.”³⁷

To date, the Supreme Court has shown no inclination to revisit its holding in *South Dakota v. Dole*.³⁸ On the contrary, Justice O’Connor sustained a similar arrangement in her opinion in *New York v. United States*.³⁹ In *New York*, the Supreme Court upheld against a federalism-based challenge the creation of financial incentives to encourage states to meet certain federal targets regarding

32. *Id.* at 210. For critiques of this approach to the federal spending power, see Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1935 (1995); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism’s Trojan Horse*, 1988 SUP. CT. REV. 85; Van Alstyne, *supra* note 8, at 314-15; Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1435-36 (1994).

33. Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1131 (1987) (“If the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed.”).

34. Baker, *supra* note 32, at 1920.

35. Yoo, *supra* note 2, at 41-42.

36. Baker, *supra* note 32, at 1924; *see also id.* at 1922 n.43.

37. *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974); *see also Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 559-63 (1985) (Rehnquist, J., dissenting). *Cf.* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-42 (1968).

38. 483 U.S. 203 (1987).

39. 505 U.S. 144, 166-69, 171-73 (1992); *cf.* McCoy & Friedman, *supra* note 32, at 108-13.

the transport, treatment, and storage of low level radioactive waste.⁴⁰ Congress also required states to adopt regulations or face preemption of state regulatory authority over radioactive waste.⁴¹ In fact, only the third provision of the Low Level Radioactive Waste Policy Amendments Act of 1985⁴² fell on federalism grounds. The Supreme Court invalidated certain “take title” provisions that would have required states failing to meet Congress’ goals to assume the ownership of low level radioactive waste.⁴³

The Supreme Court’s reasoning and results in *New York v. United States* might be defended on the theory that Congress could have preempted state laws governing low level radioactive waste transport and storage incident to its commerce powers.⁴⁴ The greater power of complete preemption of state regulation, at least arguably, should also include the lesser power of adopting a “regulate or else” stance vis-a-vis the states. Because Congress possessed the constitutional authority to accomplish directly that which it was attempting to coerce the states into doing “voluntarily,”⁴⁵ the financial incentive and access provisions did no real violence to federalism principles. *Dole*, however, imposes no such limitation, nor did Justice O’Connor suggest that any such limitation existed in her opinion in *New York*. Accordingly, the Supreme Court’s decision in *New York* simply reaffirms Congress’ virtually plenary power to tax and spend the state governments into complete submission.⁴⁶

In sum, even in this brave new world of post-post New Deal federalism, there is really no doubt that *South Dakota v. Dole*⁴⁷ permits Congress to use the spending power to accomplish indirectly that which it may not accomplish directly.⁴⁸ Throughout the contemporary Supreme Court’s “new federalism”

40. *New York*, 505 U.S. at 152-53, 171-73.

41. *See id.* at 167-68, 173-74.

42. Pub. L. No. 99-240, title I, 99 Stat. 1842 (1986).

43. *New York*, 505 U.S. at 153-54, 174-83; *see also* *Judicial Safeguards*, *supra* note 2, at 1340-42.

44. *See, e.g.,* *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 574-78, 586-91 (1937) (finding the Social Security Act, which preempted state law, a valid exercise of Congress’ power to regulate commerce).

45. *See* *McCoy & Friedman*, *supra* note 32, at 117-25.

46. *See* *Manuel v. State*, 692 So.2d 320, 330-33 (La. 1996) (holding that Louisiana’s state constitution establishes 18 to be the age of majority and finding that the right to obtain, possess, and consume alcoholic beverages is constitutionally a function of attaining the age of majority). *But see id.* at 338 (reversing on rehearing an earlier decision regarding unconstitutionality of state statute establishing 21 years of age as the minimum drinking age in order to avoid jeopardizing receipt of federal highway funds).

47. 483 U.S. 203 (1987).

48. *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 871-91 (1998); *see also* *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 270-71 (1990) (endorsing *Dole* test for conditional spending); *id.* at 283-85 (White, J., dissenting) (also endorsing *Dole*).

jurisprudence, there has not been even a hint that a working majority of the Court has come to question the continuing validity of *Dole*. Indeed, given that Chief Justice Rehnquist authored the opinion in *Dole* and is also the principal exponent of the “new federalism,” the prospects for this incongruity being addressed any time soon seem at best rather dim.⁴⁹

Congress, even under Republican leadership ostensibly committed to maintaining sound principles of federalism, has not hesitated to use its spending authority to purchase that which it cannot command. For example, President Clinton recently has endorsed a national standard for determining when the operator of a motor vehicle is driving under the influence of alcohol (“DUI”).⁵⁰ Generally, given the existence of the Twenty-first Amendment⁵¹ and the rule that the Constitution vests the police powers (encompassing regulations designed to preserve the health, safety, or morals of the citizenry) with the states, it is doubtful whether Congress could directly impose a uniform DUI standard on the states.⁵²

On the other hand, conditioning the receipt of federal highway funds on “voluntary” modifications of a state’s DUI standard is another matter entirely. Given *Dole*, there is no reason to suppose that President Clinton’s proposal suffers from any constitutional infirmities. When one couples Congress’ ability to tax state citizens with its virtually limitless power to spend on a conditional basis, federalism ceases to enjoy any meaningful substance—indeed, the ghost of Hamlet’s dead father enjoyed arguably greater corporeal existence.⁵³

This state of affairs has not gone unnoticed. Professors McCoy and Friedman denounced *Dole* immediately after the Supreme Court issued the

49. Cf. Baker, *supra* note 32, at 1918-20, 1935-54.

50. See Terry M. Neal, *Bill Seeks Uniform DWI Level*, WASH. POST, Mar. 4, 1998, at A19; Eric Pianin, *Senate Ties Crackdown on Drunk Drivers to State Highway Aid*, WASH. POST, Mar. 5, 1998, at A12; see also *Deadly Driver Reduction and Barton H. Greene Memorial Act*, H.R. Res. 982, 105th Cong., 1st Sess. (introduced March 6, 1997); *Deadly Driver and Matthew P. Hammell Memorial Act*, S. 708, 105th Cong., 1st Sess. (introduced May 6, 1997).

51. The Twenty-first Amendment repealed the Eighteenth Amendment, an amendment that gave concurrent jurisdiction to the federal and state governments to enforce prohibition. U.S. CONST. amends. XXI, § 1; XVIII, § 2. The Twenty-first Amendment also states, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI, § 2.

52. Of course, Congress could simply include a “jurisdictional element” and use its commerce power to reach at least some segment of the driving public, i.e., those drivers whose travels take them across state lines. See *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (noting that the presence of a jurisdictional element might have saved the Gun-Free School Act of 1990); *Champion v. Ames*, 188 U.S. 321 (1903) (sustaining a federal statute prohibiting lottery tickets from being transported across state lines).

53. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act I, sc. I (H. Jenkins ed., Routledge 1982).

opinion.⁵⁴ Over the course of the last ten years, additional constitutional law scholars have joined their voices to the anti-*Dole* chorus.⁵⁵ Nevertheless, the prospects for reform in this area of constitutional law seem bleak.

Without a doubt, Congress and the President recognize the potential federalizing power of *Dole*. In the immediate aftermath of *Lopez*, President Clinton promised to seek the enactment of legislation that would “encourage” states to ban voluntarily the possession of firearms near schools.⁵⁶ Professor Lynn Baker has noted the perspicacity of the President’s proposal, for “with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states.”⁵⁷ Professor Baker goes on to argue persuasively that both “liberals and conservatives alike should fear the power granted Congress by the Court’s decision in *Dole*.”⁵⁸

Essentially, Chief Justice Rehnquist does not view the states’ “voluntary” acceptance of conditional federal funds as presenting a serious federalism issue. Unless and until the Supreme Court revises its views on this proposition, tinkering with limits on the commerce power will provide little effective protection of state sovereignty. Such efforts may be “full of sound and fury,” but ultimately amount to very little, perhaps even “signifying nothing.”⁵⁹

Admittedly, it might be somewhat unfair to charge Professor Yoo with a project that he has not, at least to date, elected to undertake. On the other hand, if one takes seriously his arguments about the importance of federalism, it seems more than fair to inquire about the apparently unlimited power of Congress to use its spending authority to undermine the concept of federalism.

Given that under “[p]revailing Spending Clause doctrine,” Congress may “use conditional offers of federal funds in order to circumvent seemingly any restrictions the Constitution might be found to impose on its authority to regulate the states directly,”⁶⁰ this project seems essential to any attempt at fashioning a meaningful vision of the new federalism. Simply put, the Supreme Court must harmonize its Spending Clause jurisprudence with its Commerce Clause jurisprudence; if it fails to do so, the latter’s significance will be effectively nullified by the former.

In light of the fungible nature of the federal spending power, one wonders

54. McCoy & Friedman, *supra* note 32, at 117-27.

55. See, e.g., Baker, *supra* note 32; Thomas E. Baker, *A View to the Future of Judicial Federalism: “Neither Far Out Nor In Deep,”* 45 CASE W. RES. L. REV. 705, 722-23 (1995); McCoy & Friedman, *supra* note 32; Rosenthal, *supra* note 33; cf. Hills, *supra* note 48, at 857-91; Note, *supra* note 32.

56. See Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1.

57. Baker, *supra* note 32, at 1914.

58. *Id.* at 1917; see *id.* at 1935-54.

59. WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH*, act V, sc. V, lines 26-28 (N. Brooke ed., Oxford Press 1990).

60. Baker, *supra* note 32, at 1988.

why legal academics have focused relatively little attention on the pernicious effects of *Dole*. Legal scholars have spilled much ink on the minutiae of the Commerce Clause, while the spending power remains a relatively untouristed, although not completely undiscovered, country.⁶¹ This state of affairs cannot continue to persist if federalism is to survive as something more than a mere catch phrase. If the United States is to maintain a meaningful federalism—and by this I mean a federalism of *ends* rather than merely a federalism of *means*—the seemingly infinite federal spending power must be made finite. This irresistible force must be matched with its immovable object.

Scholarly consideration of the proper scope of the commerce powers, and the judiciary's role in delimiting those powers, is certainly a helpful exercise. It will not, however, prove to be a sufficient check on the continuing centralization of the police powers. For those who truly believe that federalism is an essential bulwark in protecting individual liberty, the problems associated with *Dole*'s gloss on the federal spending power require greater attention, not only from the legal academy but also from the Supreme Court.⁶²

It is important, of course, to keep in mind precisely *how* federalism promotes liberty. Federalism, by itself, does not directly promote or advance particular rights or liberties. Professor Yoo correctly notes that "the framers believed that the chief role states would play in their relationship with the federal government would be the protection of people's liberty."⁶³ Professor Yoo is emphasizing that the structural division of power would tend to serve as a check on the arbitrary exercise of power by the federal government, i.e., "federalism brought advantages by diffusing power."⁶⁴ In addition, Professor Yoo suggests that under the framers' system of federalism the state governments and the federal government would vie for the loyalties and affections of the citizenry "through the competition between federal and state governments to provide rights to their citizens."⁶⁵ Although I agree with both propositions, it seems to me that the case

61. See *supra* text accompanying notes 54-55.

62. I have defined a problem without offering up any concrete solutions. Although I have not given the matter the kind of systematic consideration it both deserves and requires, I think that there is much to recommend in Professor Lynn Baker's proposed reformulation of *Dole*'s "germaneness" test. See Baker, *supra* note 32, at 1962-67. Essentially, Professor Baker would presume invalid conditional federal spending that attempts to regulate states in a fashion that Congress could not directly command. See *id.* at 1962-63. Conditional spending might still survive judicial review, however, if the federal government can demonstrate that the spending is "reimbursement spending" as opposed to "regulatory spending." *Id.* at 1963. "Reimbursement spending" simply reimburses states for voluntarily undertaking particular tasks that Congress deems desirable, even if Congress could not directly command the states to perform the task at issue. *Id.* at 1963-64. "Regulatory spending," in contrast, involves an attempt to bribe or coerce states into performing a particular task by offering the states who agree to perform the designated task a bounty unrelated to the direct costs of performance. *Id.* at 1964-66.

63. Yoo, *supra* note 2, at 43.

64. *Id.*

65. *Id.*; see also *id.* at 31-32, 36-37; *Judicial Safeguards*, *supra* note 2, at 1392-1404.

for federalism as a liberty enhancing mechanism is perhaps more subtle than Professor Yoo suggests.

By stipulation, “federalism” is not an argument that liberty cannot be restrained or abridged by either the state governments or the federal government. In general, federalism is about *who* can do the restraining. Thus, for many years, the Bill of Rights operated as a check only against the federal government, but imposed no limitations on the conduct of state governments.⁶⁶ If federalism is to promote liberty, it is through a diversity of opinion among the states regarding the desirability of particular courses of legislative action. As Justice Brandeis explained, federalism permits the state governments to serve as laboratories of experimentation.⁶⁷

A federal government vested with unlimited regulatory powers, whether through the commerce powers or the taxing and spending powers, has the ability to disrupt this process of experimentation. Thus, if South Dakota believes that citizens should be permitted to drink upon reaching the legal age of majority, South Dakota should be free to implement this view through appropriate state legislation, and without interference from the central government.⁶⁸ Similarly, states on the Eastern seaboard may believe that speed limits in excess of fifty-five miles per hour are too dangerous to be countenanced, while the hardy souls in Montana prefer instead to charge local drivers with maintaining a “reasonable and proper” speed.⁶⁹ In sum, pluralism is conducive to liberty because it facilitates choice, which in turn leads to diverse laws reflecting the sensibilities of local communities.

Professor Yoo’s arguments in favor of federalism as a liberty enhancing device certainly acknowledge this point.⁷⁰ Unfortunately, however, the Supreme Court’s most recent federalism cases generally do not or, perhaps more accurately, have failed to articulate an overall analytical framework incorporating these concerns. Moreover, the majority opinion in *Dole* makes no effort to square its holding with the historical and policy based rationales that support

66. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833) (holding that the provisions of the Bill of Rights operate only against the federal government); cf. *Duncan v. Louisiana*, 391 U.S. 145, 147-50 (1968) (stating that substantive due process incorporates many provisions of the Bill of Rights against the states and applying a “fundamental rights” analysis to determine whether a particular provision of the Bill of Rights should be deemed incorporated).

67. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

68. Cf. *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (permitting Congress to establish a national drinking age through the exercise of its spending powers).

69. MONT. CODE ANN. § 61-8-303 (1997); see Ronald J. Krotoszynski, Jr., *Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change*, 47 CASE W. RES. L. REV. 423, 424 n.3 (1996).

70. Yoo, *supra* note 2, at 28, 31-32, 36-37, 43-44; *Judicial Safeguards*, *supra* note 2, at 1403-05.

imposing principled limits on the enumerated powers of the federal government, including both the spending and commerce powers. Developing a coherent theory of federalism that would allow lawyers, judges, and academics to predict accurately the probable results in particular cases is beyond the scope of my current project. Nevertheless, one can and should fault the contemporary Supreme Court for failing to address itself in a consistent and principled fashion to these considerations.

II. FEDERALISM LITE AND THE DISCRETION PROJECT

I have argued that a viable federalism must be a federalism of ends and not just means. This is a necessary, but hardly sufficient, condition for the maintenance of a federalism that is both meaningful and sustainable. A second condition precedent exists for federalism to work: it must be principled.

Professor Yoo argues effectively that the Supreme Court's turn toward a new federalism reflects a renewed commitment to protecting the states from the centralizing might of the national government.⁷¹ As he puts it, "[f]ederalism is back, with a vengeance."⁷² Rather than simply leaving the states at the mercy of such "political safeguards" as might exist to stay Congress' regulatory hand, Professor Yoo argues persuasively that federalism requires more active judicial enforcement efforts.⁷³ Because federal legislators no longer conceive of themselves as representatives of state governments, but rather view themselves as accountable to particular constituencies that happen to exist within a given state or congressional district,⁷⁴ reliance on the traditional "political safeguards" represents a false hope.

Implicit, if not explicit, in Professor Yoo's position is the notion that federalism has some value that justifies judicial efforts to protect its continued existence as a feature of our system of governance.⁷⁵ Even if one assumes that federalism will not survive if left to the kindnesses of the "political safeguards," one might still ask whether judicially-enforced federalism is a game worth the candle.

Professor Yoo presents a number of benefits associated with federalism, most notably including its checking function, which should both increase and serve to protect individual liberty.⁷⁶ Implicit in his argument, however, is the notion that this new form of judicially-enforced federalism will prove to be principled, i.e., that it will not serve as a device for permitting activist (conservative) judges to impose their policy preferences from the bench. Yet, the Supreme Court to date has failed to define federalism and state sovereignty in a fully coherent,

71. Yoo, *supra* note 2, at 27-28, 43-44; see also *Judicial Safeguards*, *supra* note 2, at 1334-57.

72. Yoo, *supra* note 2, at 27.

73. *Id.* at 35-36, 41-44.

74. See *id.* at 39-41; see also *Judicial Safeguards*, *supra* note 2, at 1399-1400.

75. Yoo, *supra* note 2, at 27-28, 31-32, 37, 43-44.

76. *Id.* at 32; see also *Judicial Safeguards*, *supra* note 2, at 1402-05.

satisfying manner. The Court has not explained precisely what the new federalism is, much less *why* the new federalism represents an improvement over the post New Deal conception of federalism. Whatever the precise reasons, the Court has failed to explain convincingly why state autonomy is a normative good of constitutional proportions.

Perhaps the Supreme Court prefers a fuzzy, “I know it when I see it”⁷⁷ federalism to a principled federalism because it tends to increase the Court’s discretion. One cannot help but wonder if this omission is intentional. Indeed, Professor Malloy’s essay raises this problem directly and cogently.⁷⁸ No useful purpose would be served by attempting to duplicate her arguments. She raises serious questions about the Supreme Court’s real commitment to federalism as a core principle of constitutionalism as opposed to a convenient device for limiting federal civil rights, civil liberties, labor laws and environmental regulations.⁷⁹ Her thesis supports my broader point that an effective federalism must be principled. Put differently, the results in cases involving questions of federalism should reflect honest and professional application of doctrine rather than an effort to reach a particular result.⁸⁰

It is probably too early to determine whether a majority of the Supreme Court is committed to federalism as an end in itself rather than as a means of thwarting particular congressional attempts at labor and environmental regulation. It does not require much imagination, however, to hypothesize facts that would demonstrate whether the new federalism represents a principled doctrine or a fig leaf for judicial activism.

Consider, for example, a federal law that requires the states to legalize partial birth abortions, i.e., a law that, consistent with Congress’ Section 5 powers under the Fourteenth Amendment, mandates the availability of late-term, partial birth abortions.⁸¹ Suppose further that the law mandates that the states fund such procedures from their general treasuries and, moreover, requires publicly-owned hospitals to offer such services to their patients. Given the present majority’s attitude toward abortion, such a law would make an excellent candidate for the application of the new federalism. Chief Justice Rehnquist might easily draft a sonorous opinion outlining the traditional police powers of the states regarding the regulation of abortion, note the absence of any explicit delegation of authority to the federal government over this matter, and invoke general principles of

77. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

78. Malloy, *supra* note 5, at 45-47.

79. *Id.* at 45-48, 49-56, 69-70.

80. See Wechsler, *supra* note 10, at 10-20; cf. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (arguing that Professor Wechsler’s quest for a jurisprudence built upon neutral principles is a quixotic task because judging is essentially an exercise in interest group politics); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 818-21 (1983) (arguing that the judicial decisional techniques endorsed by adherents of legal process theory “are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants”).

81. See generally *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

federalism as a barrier to the adoption and enforcement of such a law.

Let us now imagine the mirror image of the hypothetical law—a federal statute that criminalizes partial birth abortion, the laws of any particular state notwithstanding. Assume that the ban extends to public hospitals that receive any form of federal assistance (i.e., Medicare or Medicaid funding). Congress could probably enact such a law, if not incident to its commerce powers, then certainly incident to its taxing and spending powers.⁸² Unlike its twin, this piece of statutory craftsmanship stands a good chance of surviving judicial review.⁸³ This is because the Supreme Court probably would not apply neutral federalism principles if the federal government attempted to prohibit or severely discourage particular kinds of abortion services (even if public hospitals owned and operated by a state government wish to provide such services consistent with a mandate to do so from the state legislature).⁸⁴ Instead, the case would likely be decided on the abortion axis and will reflect the subjective views of the individual justices on the substantive question of whether partial birth abortions are immoral. In a word, the fate of either law will hang not on principles of federalism, but rather on scruples about abortion.

Nothing would please me more than to learn that I am quite mistaken in thinking that the results in the two hypothetical cases would turn on factors unrelated to whether Congress possesses constitutional authority to regulate abortion in order to protect the health, safety, or morals of the citizenry. As things stand today, the Supreme Court's case law does not yet provide a clear answer as to whether the new federalism is principled or merely instrumentalist. An unprincipled federalism is no more likely to survive over time than an unprincipled faith in the ability of the "political safeguards" of federalism to keep the national legislature from overflowing its constitutional banks.

The countermajoritarian problem presents itself most acutely when the Supreme Court strikes down legislation passed by the federal Congress.⁸⁵ The "new federalism" has resulted in at least four federal laws biting the dust. If the Court continues in this fashion, Congress and perhaps even the American public will surely demand an accounting, asking the federal judiciary precisely why federalism principles preclude Congress from restricting gun sales to felons or from protecting school children from guns. In my view, the profoundly countermajoritarian character of the Supreme Court's new federalism decisions exacerbates the need for neutral principles that serve both to justify and explain the Court's actions. Professor Yoo appears to agree that the Supreme Court must provide an overarching theory of federalism that puts its recent decisions into

82. See Baker, *supra* note 32, at 1918-32.

83. Cf. *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that the federal government may suppress truthful medical information about abortion services, in the context of a patient-doctor relationship, if it so chooses).

84. Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

85. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-33 (1962); ELY, *supra* note 10, at 43-72, 101-04.

some larger doctrinal framework.⁸⁶ This seems an essential task that deserves attention sooner rather than later. To the extent that the Supreme Court fails to articulate neutral principles that will govern its new “new federalism,” commentators like Professor Malloy are quite correct to challenge the Supreme Court’s motives for deploying federalism selectively to strike down seemingly desirable health, safety, and anti-discrimination legislation.⁸⁷

CONCLUSION: GETTING FROM HERE TO THERE

The Supreme Court’s apparent willingness to limit Congress’ addiction to centralizing the police powers at the national level of government should lead to greater personal freedom, as various states adopt differing views as to the merits or demerits of a particular approach to a given problem or issue.⁸⁸ Professor Yoo offers some important reasons why these efforts should matter—reasons that suggest why we should deem the Supreme Court’s emerging Tenth Amendment jurisprudence to be an important and constitutionally salutary development.⁸⁹ I regret that I cannot yet share his enthusiasm regarding the importance of the project or its prospects for ultimate success.

Congress remains free to buy that which it cannot directly command. So long as this remains the case, federalism does not present a meaningful check against congressional schemes to nationalize traditional police power regulation. Moreover, even if the Supreme Court reestablishes meaningful limitations on the federal spending power, it must also demonstrate that its decisions about whether the Constitution vests legislative authority over a particular problem at the state or federal level reflect something more than the subjective policy preferences of a majority of the justices. In the end, I find myself listening carefully to the sounds of sovereignty, but I just cannot seem to pick up the beat.

86. Yoo, *supra* note 2, at 27-28, 42-44; *see also* *Judicial Safeguards*, *supra* note 2, at 1348-49, 1352-53, 1356-57.

87. Malloy, *supra* note 5, at 45-47, 68-70.

88. *See* Yoo, *supra* note 2, at 35-36, 43-44; *see also* Baker, *supra* note 32, at 1935-54; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992); Hans A. Linde, *E Pluribus: Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); *see also* *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting).

89. Yoo, *supra* note 2, at 27-28, 32, 36-38, 42-44.

SOUNDS OF SOVEREIGNTY: DEFINING FEDERALISM IN THE 1990S

JOHN C. YOO*

Federalism is back, with a vengeance. Not so long ago, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹ it appeared that we had witnessed the "Second Death of Federalism," in the words of one prominent scholar.² In that case, the Supreme Court had announced that it would no longer exercise judicial review to police the boundaries between the federal and state governments. After *Garcia*, the states were to seek protection from expansive exercises of federal power from the national political process, particularly from their representatives in the Senate.

Despite this striking declaration of judicial abdication, the Supreme Court has devoted much of its resources in the 1990s to restoring a meaningful balance between federal and state power. Beginning in 1991 with *Gregory v. Ashcroft*,³ and continuing the following year with *New York v. United States*,⁴ then with *United States v. Lopez*,⁵ *Seminole Tribe of Florida v. Florida*,⁶ and then with the two blockbuster cases of the 1997 Term, *City of Boerne v. Flores*⁷ and *Printz v. United States*,⁸ the Court has attempted to protect state autonomy both by reading federal statutes narrowly so as not to invade state policy-making spheres or by striking down legislation that regulates states themselves.⁹ In these cases, the Court has restored federalism in three ways: it has identified certain subject matters that are to remain within the policy-making authority of the states; it has sought to protect the institutional independence of the states; and, it has placed limits on the exercise of Congress' enumerated powers.

These recent cases have come under criticism for their failure to advance a comprehensive theory that justifies the Court's rejuvenation of federalism.¹⁰ For

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1. 469 U.S. 528 (1985).

2. William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

3. 501 U.S. 452 (1992).

4. 505 U.S. 144 (1992).

5. 514 U.S. 549 (1995).

6. 517 U.S. 44 (1996).

7. 117 S. Ct. 2157 (1997).

8. 117 S. Ct. 2365 (1997).

9. For a fuller analysis of the Court's recent cases, see John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1334-57 (1997).

10. See, e.g., Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on a National*

example, many of the rationales that the Court has provided for protecting federalism are instrumental. According to this criticism, the alleged benefits that arise from federalism derive from administrative decentralization, rather than from innate value in separating national from state power.¹¹ The restoration of federalism, then, will be only fleeting because it will last as long as the benefits of decentralizing government power will outweigh its costs. Once centralization again becomes a more effective method for addressing social problems, the Court's jurisprudence will shift away from protecting the states. Federalism is not really a value of constitutional proportions, but only a tool whose value depends on its usefulness in addressing social issues.

To some extent, this criticism of the Court's recent cases is valid. Although the Court has made clear that it intends to restore the exercise of judicial review over questions involving the balance between federal and state power, it has provided little guidance concerning where the line between the two spheres of government ought to rest. Without a normative theory of federalism, the Court's jurisprudence seems destined to pursue a gradual, common-law-like evolution. This evolution will be halting, perhaps even unsuccessful, without a broader theory to guide the judiciary as it meets each new case.

This contribution to the symposium seeks to sketch out such a theory. It looks to the original understanding of federalism and of judicial review to establish the normative purposes of federalism. To be sure, protection of state rights was a political necessity to secure a new Constitution. But it was more than that. It was believed that federalism would lead to the protection of individual rights, first by creating independent governments that would create new individual liberties, and second by sustaining sovereign entities that could oppose the national government if it should oppress the people. Linked to this first justification was a second theory of federalism. Similar in purpose to the separation of power in the national government, dividing power between the federal and state governments was thought to produce an additional safety against a potentially tyrannical state. By creating competing power centers, the Constitution would safeguard liberty by ensuring that no level of government could exercise a unified authority over the people. States required institutional autonomy so they could oppose the power of the central government, and in this space free from government regulation, liberty would result.

I. STATES AND SOVEREIGNTY

Judicial protection of the states would be of little value if the states did not play an important role in the lives of the people. As the historical evidence from the Constitutional Convention and the ratification debates indicates, the framers recognized that the states were to be a permanent feature of the national political

Neurosis, 41 UCLA L. REV. 903, 907-08 (1995).

11. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1075 (1995); Rubin & Feeley, *supra* note 10, at 914-26.

landscape. As Chief Justice White would declare for the Court in *Texas v. White*,¹² the United States is “an indestructible Union, composed of indestructible States.”¹³ States existed, however, not just for the sake of existence, but for the purpose of effectuating the will of the people and for protecting their lives, liberty, and property. As James Madison wrote in *Federalist No. 46*: “The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”¹⁴

It remains for us to discuss, however, what the framers believed those powers and purposes to be. Certainly, we could conclude that because the federal government is one of limited, enumerated powers, all powers that are not encompassed in the Constitution’s grants of power must be left to the states. As Madison wrote in *Federalist No. 45*: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”¹⁵ This proposition would be enshrined in the Tenth Amendment, which declares that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁶ But in light of the broad sweep given to the Commerce Clause¹⁷ and other federal powers by the modern Court, it seems more worthwhile to identify those areas that the framers believed would remain in the control of the states, despite the Constitution’s grant of new powers to the national government.

Broadly stated, the framers understood the Constitution to grant the national government primarily those powers involving foreign relations.¹⁸ The states would retain primary jurisdiction over almost all other domestic matters, such as taxation, judicial administration and law enforcement, and social and moral legislation. In defending the Constitution from Anti-federalist claims that the Necessary and Proper Clause¹⁹ gave the national government unlimited powers, Madison declared that federal powers “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected.”²⁰ In contrast, state power would “extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order,

12. 74 U.S. (7 Wall.) 700 (1868) (Reconstruction Era case finding that Texas had never ceased to be a state during the Civil War), *overruled by* *Morgan v. United States*, 113 U.S. 476, 496 (1885).

13. *Id.* at 725.

14. THE FEDERALIST NO. 46, at 237 (James Madison) (Garry Wills ed., Bantam 1982).

15. THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., Bantam 1982)..

16. U.S. CONST. amend. X.

17. U.S. CONST. art. I, § 8, cl. 3.

18. *See, e.g.*, THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., Bantam 1982).

19. U.S. CONST. art. I, § 8, cl. 8.

20. THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., Bantam 1982).

improvement, and prosperity of the State.”²¹ Given that the framers believed the nation’s new government and its isolation from Europe would render it relatively immune from the constant wars of the Continent, this meant that the federal government would not often exercise its powers.

Article I, Section 8’s grant of Commerce Clause authority constituted the only significant exception to this general division of authority between the national and state governments.²² According to the Federalists, most of the other powers, such as “war and peace, armies and fleets, treaties and finance,” had already been vested in the Congress of the Articles of Confederation.²³ The new Constitution merely made those powers more effective by eliminating the national government’s reliance upon the states and by giving the federal government the means to act directly upon its citizens. Some, most notably William W. Crosskey, have argued that the framers enumerated Congress’ powers in Article I, Section 8 not to give them to the federal government and take them from the states, but to vest them in Congress rather than the President.²⁴ Under this strained interpretation, the federal government becomes one of general police powers with the only exceptions to its authority declared in Article I, Section 9 and the Bill of Rights. Crosskey’s work clearly misinterpreted the Constitution, the Articles of Confederation, and the British Constitution, for many of the powers in Article I, Section 8 had never belonged to the executive branch. Furthermore, providing Congress with a general legislative power would have undermined the purpose of a written Constitution.

A review of the case law, however, suggests that the Commerce Clause indeed has evolved into a virtual federal police power, *United States v. Lopez* notwithstanding.²⁵ Since the Court has experienced great difficulty in finding the outer limits of the Commerce Clause, a more useful inquiry would look to those areas that the framers understood to be wholly within state jurisdiction. This will also help us determine what the framers believed they were protecting when they placed state sovereignty under the aegis of judicial review.

In defending the Constitution, the Federalists were often quite explicit in

21. *Id.*

22. “If the new Constitution be examined with accuracy and candour, it will be found that the change which it proposes, consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained.” *Id.*

23. *Id.*

24. WILLIAM W. CROSSKEY, 1 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 409-508 (1953). For a modern adherent, see Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2233-36 (1996).

25. *Lopez*, 514 U.S. 549 (1995), for example, did not overrule cases such as *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress may regulate purely intrastate production of wheat), or *Perez v. United States*, 402 U.S. 146 (1971) (Congress may prohibit arson that occurs only in a single state).

what areas would be off limits to the federal government. In *The Federalist No. 17*, Alexander Hamilton included the “administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature.”²⁶ Other framers declared in the state ratifying conventions that the federal government could not invade a state’s authority to establish the common law rules governing property, contracts, trusts and estates, and other local matters.²⁷ The framers never engaged in a thorough enumeration of all of the items under state control, because such a listing would have “involv[ed] a detail too tedious and uninteresting to compensate for the instruction it might afford.”²⁸ No listing was necessary, because the principle of a national government of limited powers was clear to all. Hamilton even seems to have assumed that the distinction between federal and state power was so obvious that if the federal government, for example, sought to regulate the “law of descent,” it would “be evident that in making such an attempt [the federal government] had exceeded its jurisdiction and infringed upon that of the State.”²⁹

The framers did not want to preserve these areas of state autonomy solely for the sake of preserving state autonomy. As will be explored in more detail in the next section, the framers deeply feared that the national government would seek to burst the written restrictions on its powers.³⁰ Federal officials would do so not to help the rich and powerful, or the weak and needy, but to grab power for the institution of which they were a part. In the framers’ minds, the states were to serve as an important bulwark against this possibility. Allowing states to regulate much of the daily lives of their citizens would make those citizens more loyal to the state governments, and therefore more likely to support their states in opposing an overweening national government.

This relationship between state sovereignty, citizen loyalty, and maintaining checks on the federal government becomes clear when we examine *The Federalist’s* discussion of state law enforcement. Hamilton identified “the ordinary administration of criminal and civil justice” as one of the most important powers to be left in the hands of the states.³¹ The justice system was so important, in Hamilton’s mind, not because states would be more efficient than the national government at law enforcement, but because “[t]his of all others is the most powerful, most universal and most attractive source of popular obedience and attachment.”³² An effective protection of life, liberty, and

26. THE FEDERALIST NO. 17, at 80 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

27. See, e.g., Edmund Pendleton, Speech Before the Virginia Convention (June 5, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 40 (Jonathan Elliot ed., 2d ed., J.B. Lippincott 1836) [hereinafter ELLIOT’S DEBATES]. I have relied upon Justice Thomas’ opinion in *Lopez*, 514 U.S. at 590-91 (Thomas, J., concurring), for sources on this point.

28. THE FEDERALIST NO. 17, at 81 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

29. THE FEDERALIST NO. 33, at 157 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

30. See *infra* notes 36-42, 56-57 and accompanying text.

31. THE FEDERALIST NO. 17, at 81 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

32. *Id.*

property, Hamilton argued, “contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government.”³³ By allowing the states to perform effectively and win the support of their citizens, the Federalist concluded, the Constitution sought to bolster state power so as to check the national government. Wrote Hamilton:

This great cement of society which will diffuse itself almost wholly through the channels of the particular [state] governments, independent of all other causes of influence, would ensure them so decided an empire over their respective citizens, as to render them at all times a complete counterpoise and not unfrequently dangerous rivals to the power of the Union.³⁴

In this conception, judicial review becomes necessary to protect the state’s ability to check the federal government. If the federal government is permitted to invade more and more of the jurisdiction of the states, then the states will be unable to maintain the support of their citizens. So weakened, the framers feared, the states would prove to be little obstacle to a national government intent on seizing absolute power. Sovereignty is not maintained for sovereignty’s sake, but instead is necessary to check those driven by power for power’s sake. As we will see shortly, the framers believed that maintaining state sovereignty and checking national power ultimately would lead to greater liberty for the people.

II. STATE SOVEREIGNTY, JUDICIAL REVIEW, AND RIGHTS

The framers’ view of the role of judicial review and federalism was very much in keeping with their understanding of constitutional law, which, I would suggest, is quite different from the way most constitutional scholars view the subject. Underlying the Political Safeguards approach to judicial review is a concern over individual rights. Only by abstaining from federalism or separation of powers controversies, this theory maintains, can the Court preserve the political capital that allows it to protect individuals from an oppressive majority.³⁵ This approach is very much in keeping with the manner in which the Constitution is taught and studied, with a division between the structural elements of the Constitution and its rights-bearing provisions.

But as Akhil Amar has suggested, the framers did not understand the Constitution to embody this neat separation between structural issues, on the one hand, and individual rights, on the other.³⁶ The Bill of Rights and the structural elements of the Constitution should be viewed as a whole, and just as the

33. *Id.* at 82.

34. *Id.*

35. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-60 (1954).

36. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991).

Constitution itself has certain protections for individuals, such as the Ex Post Facto Clause,³⁷ the Bill of Rights has much to say about federalism. Indeed, when one examines together the debates about whether to have a Bill of Rights and whether the Court should review federalism questions, it becomes clear that the Federalists and Anti-Federalists were really arguing about the same conceptual issue. Rather than federalism and individual rights, both debates were about controlling the central government. Above all, the framers were concerned not so much about whether individuals would have the unimpeded right of free expression, as they were concerned about restraining a federal government that someday might lose touch with the people and act in its own self-interest. As I have argued elsewhere in regard to the Ninth Amendment, the main purpose of the First Amendment and much of the Bill of Rights, which was added in response to Anti-Federalist demands, was simply to deny the federal government power, rather than to define the rights of the individual.³⁸

The framers' unified understanding of federalism and rights becomes clear when the Bill of Rights and its history are briefly examined. A reading of the Bill of Rights reveals that many of its guarantees are not written as individual rights as such, but as restrictions on what the federal government may do with its enumerated powers. Thus, the First Amendment does not speak of the individual's freedom of speech or religion, as did several of the state declarations of rights at the time, but instead says that "Congress shall make no law respecting" those subjects.³⁹ The Third Amendment forbids the federal government from quartering troops;⁴⁰ the Fourth Amendment forbids the issuance of warrants without probable cause;⁴¹ the Eighth Amendment forbids excessive bails and fines, or cruel and unusual punishments.⁴² These amendments do not define, in positive law, the rights of the individual. Instead, they are simply a list of actions that the federal government may not take, much like those listed in Article I, Section 9.

Indeed, one need only read to the end of the Bill, when one encounters the Ninth and Tenth Amendments, to fully understand the link between federalism and the Bill of Rights. It is in these two amendments that the relationship between individual rights and federalism are expressly linked. The Ninth Amendment states that "[T]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁴³ Thus, the Ninth Amendment is, at a minimum, a rule of construction forbidding the expansion of federal power by negative implication,⁴⁴ and, as I have argued,

37. U.S. CONST. art. I, § 9, cl. 3.

38. John C. Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 996-99 (1993).

39. U.S. CONST. amend. I.

40. U.S. CONST. amend. III.

41. U.S. CONST. amend. IV.

42. U.S. CONST. amend. VIII.

43. U.S. CONST. amend. IX.

44. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1219-23 (1990).

an explicit recognition of other popular rights, such as the right to alter and abolish government, that imposes further restraints on the operation of federal power.⁴⁵ The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁴⁶ The federalism aspects of this Amendment, the last of the Bill of Rights, could not be clearer. It declares expressly what the Federalists had argued was already implicit in the structure of the Constitution: The federal government would be one of delegated powers, and as such it could not act beyond those limitations.⁴⁷

Furthermore, the Bill of Rights, to the extent that it protects rights rather than restricts powers, recognizes rights that belong to those in the majority, rather than the minority, to the States, rather than to individuals. Thus, the First Amendment does not give the individual a right to associate, but instead declares that Congress cannot abridge the right of “the people” to assemble or to petition the government.⁴⁸ The Bill of Rights’ use of “the people,” rather than the individual, emphasizes that the rights protected are those of the majority—the people’s right to keep and bear arms,⁴⁹ for example—against an oppressive central government.⁵⁰ It will be recalled that this was precisely the same concern that Federalists sought to address with their arguments concerning the political safeguards of federalism and, ultimately, judicial review. Further, the Constitution recognizes intermediate institutions whose roles are to be preserved: established state churches,⁵¹ state militias,⁵² and the jury.⁵³ All of these entities imposed substantive checks on the powers and reach of the federal government, and both the church and the militia were critical to State authority.⁵⁴ In fact, by including these provisions in the Bill of Rights, the framers quite consciously understood them to defend principles of federalism as much as individual rights.

Although there are no records of the state ratifications of the Bill of Rights, the records we have of its drafting indicate that its purpose was to use judicial review to check Congress.⁵⁵ In this sense, the Bill of Rights was significant

45. Yoo, *supra* note 38, at 972-86.

46. U.S. CONST. amend. X.

47. See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 847-50 (1995) (Thomas, J., dissenting) (arguing Article I of the Constitution solves any ambiguity in the Tenth Amendment by providing Congress with “[a]ll legislative Powers herein granted” and enumerating those powers).

48. U.S. CONST. amend. I.

49. See U.S. CONST. amend. II.

50. When state constitutions and declarations of rights used the terms “rights” of “the people,” they referred specifically to popular sovereignty rights needed to control and, if necessary, abolish the government. See Yoo, *supra* note 38, at 974.

51. U.S. CONST. amend. I.

52. U.S. CONST. amend. II.

53. U.S. CONST. amend. VI.

54. See Amar, *supra* note 36, at 1157-75.

55. See *Judicial Review, 1780-1787*, Commentary, in *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 403-05 (Bernard Schwartz ed., 1971) [hereinafter *DOCUMENTARY*].

because it gave individual rights the *same protections* that the Constitution already had given to the states. In initially debating the need for amendments, James Madison argued that “I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done.”⁵⁶ Further, in discussing the enforceability of the Bill of Rights, Madison explicitly declared that both the federal courts and the states would ensure that the federal government would not encroach on the rights of the people:

If [these amendments] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Besides, this security, there is a great probability that such a declaration in the federal system would be enforced; because the State Legislatures will jealously and closely watch the operations of this Government, and be able to resist with more effect every assumption of power, than any other power on earth can do; and the greatest opponents to a Federal Government admit the State Legislatures to be sure guardians of the people’s liberty.⁵⁷

If the Bill of Rights were solely about individual rights, there would be little need for the state legislatures to join the federal courts in enforcement. But reliance upon the States makes perfect sense when it is “assumption[s] of power” that must be guarded against. When that is the task, the framers saw no inconsistency, as we saw earlier, in having both the federal courts and the States—either independently or through the federal government itself—involved in opposing unconstitutional exercises of power.

Another way to examine this point is to ask whether the framers believed that the federal courts would be the primary enforcers of individual rights. Certainly, as the dissenters in *Garcia* noted, the Political Safeguards Theory can apply to individual rights as easily as it does to federalism.⁵⁸ Because individuals are adequately represented in the federal government—they directly elect members of the House and Senate and indirectly choose the President—does not the Political Safeguards Theory demand that individuals rely upon the political process to safeguard their rights? As Justice Powell put it, “One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the

HISTORY].

56. James Madison, Speech Before the House of Representatives (June 8, 1789), in DOCUMENTARY HISTORY 1025.

57. *Id.* at 1031-32.

58. *Garcia*, 469 U.S. at 565 n.8 (Powell, J., dissenting).

political process.”⁵⁹ During the ratification debates, the framers rarely mentioned that the federal courts would become the guardians of individual liberties. In fact, they discussed judicial review of federalism more often than they did judicial review of individual rights. With the passage of the Bill of Rights, the framers raised individual rights to the same level as federalism in terms of their importance, and, ultimately, their protection by the courts.

One final way to examine the link between state sovereignty and individual rights is to recall the framers’ understanding of the role of the former in protecting the latter. During the Eighteenth Century, the revolutionaries had come to view the state legislatures as the primary guardians of the people’s rights and liberties against the Crown and Parliament.⁶⁰ This understanding continued under the Articles of Confederation and the new Constitution. The framers agreed that state legislatures would play two important roles in regard to rights. First, the states would continue to bear the primary responsibility for defining and enforcing individual rights. While the national government’s powers “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce,” Madison wrote in *Federalist No. 45*, “[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people.”⁶¹ This was the creative role that Justice Brennan believed states should adopt in defining individual rights more broadly than the federal government.⁶²

In addition to creating individual rights, states also were to serve as the primary defenders of those rights against a national government that sought to exceed the boundaries of its powers. Even if parties within the national legislature failed to restrain Congress, Hamilton wrote in *The Federalist No. 26*:

[T]he state Legislature, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against incroachments from the Federal government, will constantly have their attention awake to the conduct of the national rulers and will be ready enough, if any thing improper appears, to sound the alarm to the people and not only to be the VOICE but if necessary the ARM of their discontent.⁶³

In addition to blocking unwarranted federal action through their participation in the selection of the national government, state legislatures are to protect the people’s rights by organizing outside opposition to the national government.⁶⁴

59. *Id.*

60. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 164-75 (1967); see also Yoo, *supra* note 9, at 1362-64.

61. THE FEDERALIST NO. 45, at 236 (James Madison) (Garry Wills ed., Bantam 1982).

62. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-504 (1977).

63. THE FEDERALIST NO. 26, at 128-29 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

64. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1492 (1994).

States performed this function not only by acting as something of a trip wire to detect illegal federal action, but also by acting as loci and organizers of resistance. As Hamilton put it, states “can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states; and unite their common forces for the protection of their common liberty.”⁶⁵ Ultimately, this resistance could take a military form, as Madison argued: “the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprizes of ambition, more insurmountable than any which a simple government of any form can admit of.”⁶⁶

In this dual way, the continued existence of states as quasi-independent sovereigns is crucial to the preservation of individual liberty. Removing one of the primary institutional checks on the power of Congress—judicial review—in order to better protect individual rights would have made little sense to the framers. They would have seen the disintegration of state sovereignty as a potential threat to individual rights, first because it would prevent innovation in their creation, and second because it would eliminate a check on the national government’s ability to invade those rights. Judicial review, therefore, had two salutary effects in regard to individual rights: It not only protects those rights, it also protects other institutions that are charged with guarding rights.

This Article also shows that the framers’ understanding of state sovereignty and judicial review anticipated some of the concerns raised in recent scholarship concerning the legislative process. Public choice scholars argue that the legislative process should be conceived of as a market in which the product—legislation—is created by the efforts of organized groups to achieve their special interests.⁶⁷ Under this theory, congressmen further their interests by seeking to maximize their chances for re-election.⁶⁸ Congressmen will provide legislation to those groups that can provide the most campaign donations and political support—in other words, legislation goes to the highest bidder. Such legislation often will not further the public good, because private groups likely will seek laws that generate narrow benefits for their members at the expense of costs that are imposed on the diffuse, unorganized general public. Reaction to this thesis has been two-fold. There are those who argue that this pluralism ought to be accepted, and that courts must enforce statutes in order to give effect to the legislative bargains between interest groups.⁶⁹ In other words, groups

65. THE FEDERALIST NO. 28, at 137 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

66. THE FEDERALIST NO. 46, at 242 (James Madison) (Garry Wills ed., Bantam 1982).

67. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-17 (1991). The summary of the public choice approach here is necessarily brief; for a comprehensive description of interest group theory and its faults, see generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

68. See FARBER & FRICKEY, *supra* note 67, at 22.

69. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an*

should get what they pay for. Others believe that interest group theory justifies more active judicial review that prevents private groups from using the legislative process in ways that do not further the public good.⁷⁰

The framers clearly anticipated the possibility that organized factions would seek to use the legislative process to the detriment of the public good. Abuse of the legislative process, after all, is not a phenomenon of the Twentieth Century. James Madison's solution, set out in *Federalist No. 10*, was to create a large republic, in which "clashing interests" would cancel each other out due to the large number of interests and the great expanses of distance and time.⁷¹ Because Madison believed that "the most common and durable source of factions, has been the various and unequal distribution of property,"⁷² his answer to the problem of interest group legislation seems limited to laws involving economic interests. In a sense, then, the framers believed that the political safeguards would work, but only when it came to economic legislation.

But what the framers emphasized during their debate over federalism appears to be unnoticed by public choice scholars. The framers would have agreed with modern thinking concerning the potential for a gap between the duty of representation and the incentives created by personal interests; in other words, they realized that the interests of legislators would not necessarily match the interests of their constituents. Under the founding generation's conception, however, legislators' interests would not naturally fall into line with those of powerful factions either. Instead, the greater fear was that the people's representatives would pursue their own *institutional* interests, and that these interests would lead them to expand national power despite the Constitution's written enumerations. The statement of the minority at the Pennsylvania ratifying convention is illustrative:

The permanency of the appointments of senators and representatives, and the controul the congress have over their election, will place them independent of the sentiments and resentment of the people, and the administration having a greater interest in the government than in the community, there will be no consideration to restrain them from oppression and tyranny.⁷³

Interest-Group Perspective, 18 J.L. & ECON. 875 (1975).

70. See, e.g., MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 17-25, 31-40 (1966); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 310 (1988); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 85-86 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690-92 (1984).

71. THE FEDERALIST NO. 10, at 45-49 (James Madison) (Garry Wills ed., Bantam 1982).

72. *Id.* at 44.

73. *Dissent of the Minority of the Pennsylvania Convention*, reprinted in 1 DEBATE ON THE CONSTITUTION 526, 548 (Bernard Bailyn, ed. 1993) [hereinafter BAILYN]; see also Fair

While an interest group might seek to capture rents by paying congressmen to infringe on federalism and state sovereignty, federal legislators also might seek to expand their power for power's sake, without intentionally benefitting an interest group.

As members of the federal government, legislators would possess the driving interest to expand the power of the federal government, even perhaps if it did not benefit them in terms of political support. The founding generation feared that Congress would seek to grab more power from the states in order to enhance its own institutional power, prestige, and glory. Some public choice theorists would express this as the idea that federal legislators always would seek to expand national powers, because a broader national jurisdiction would allow them to regulate more issues, which would then allow them to attract more political support from more coalitions interested in those issues.⁷⁴ Others might argue, however, that under certain conditions the self-interested federal legislator would defer to state regulations, specifically when a group has made an investment in certain state laws, or when customized state law has been tailored to the needs of local interest groups, or when the federal government seeks to avoid politically risky issues.⁷⁵ In the framers' eyes, however, the problem extended beyond preventing the legislature from providing special benefits to organized groups. The framers chose to extend judicial review to federalism questions precisely because they did not trust legislators to pursue the interests of their constituents above their own institutional interests. The framers feared that congressmen would seek power solely for their love of power.

Legislators were not the only threat to a limited Constitution; some framers even feared that the states and their people could not be trusted to protect federalism. Congressmen might represent popular interests back home, but those popular interests might not always represent the states' long-term institutional interests. Alexander Hamilton made this point during the ratification debates in New York. During the ratifying convention, Anti-Federalist Melancton Smith proposed an amendment that in part would have allowed the state legislatures to recall their senators.⁷⁶ In defending the amendment, Smith argued "that as the senators are the representatives of the state legislatures, it is reasonable and proper that they should be under their controul."⁷⁷ Hamilton successfully defeated the amendment by arguing that, while senators did represent the states

Representation Is the Great Desideratum in Politics, "Brutus" IV, reprinted in 1 BAILYN, *supra* 423, 426; *Letters from the "Federal Farmer" to "The Republican,"* reprinted in 1 BAILYN, *supra* 245, 245-59.

74. See Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 269-74 (1990).

75. See *id.* at 274-90.

76. Melancton Smith and Alexander Hamilton Debate Rotation in the Senate, in 2 BAILYN, *supra* note 73, at 803.

77. *Id.* at 805.

in the federal government, senators were there to defend the *rights* of the state first, and its *interests* second. Said Hamilton:

[T]he [constitutional convention] certainly perceive[d] the distinction between the rights of a state and its interests. The rights of a state are defined by the constitution, and cannot be invaded without a violation of it; but the interests of a state have no connection with the constitution, and may be in a thousand instances constitutionally sacrificed.⁷⁸

As Hamilton explained, it was because short-term thinking might lead a state and its people to ignore the longer-term good of maintaining the boundaries on federal power that, in part, the Constitution gave senators six-year terms. “To prevent this, it is necessary that the senate should be so formed, as in some measure to check the state government, and preclude the communication of the false impressions which they receive from the people.”⁷⁹ Continuing Hamilton’s point, we cannot be sure that either the Senate or the Congress will be full-time guardians of federalism, hence the need for a judicial role in policing the balance between federal and state powers.

A state’s popular interests and a state’s institutional rights became further detached at the time of the Seventeenth Amendment’s ratification, which removed state legislatures from the process of selecting Senators.⁸⁰ State legislatures, as opposed to the people of a state, were perhaps the only institutions that had a consistent, long-term interest in protecting state sovereignty. It seems telling that since the passage of the Seventeenth Amendment, state governmental entities, such as legislators, attorney generals, and governors, have had to organize into national interest groups to make their interests known in the political process. Other institutions, such as political parties, that allow states to influence the political process have also grown in strength.⁸¹ The very presence of these groups and outside mechanisms indicate that the Political Safeguards Theory has failed. States should not have to organize into *national* lobbying groups if, as the Political Safeguards Theory holds, they could pursue their interests directly through their elected representatives in Congress. One could catalogue other developments, such as the nationalizing effect of changes in technology, economics, and culture, that also have diminished the respect for local concerns in the halls of Washington.⁸²

The widening gap between a state’s popular interests and its institutional rights may explain why the federal government has been able to expand its powers so dramatically in the last sixty years. To be sure, the Supreme Court opened the door by granting Congress substantial deference in the exercise of its Commerce Clause powers, but the Court did not force Congress to run through with the speed it has. The Political Safeguards Theory predicts that Congress

78. *Id.* at 813.

79. *Id.* at 811.

80. U.S. CONST. amend. XVII.

81. See generally Kramer, *supra* note 64.

82. See *id.* at 1503-14.

will restrain itself, because the states will prevent their Senators and Representatives from invading the sovereignty of the states. Today's great mass of federal regulation, however, makes more sense when we consider the framers' insight that the momentary interests of a state and the institutional or constitutional interests of a state at times may conflict.⁸³

Another way to understand this point is to view the relationship among the states as a competitive one, in which each state seeks to maximize the welfare of its inhabitants. A significant determinant of state welfare today is the great pool of federal funds available through a variety of national programs. Sometimes federal funds will not be available without a corresponding loss of state sovereignty. For example, in order to receive funds a state often must accept federal conditions on how the money is spent, such as with highway construction or welfare programs, or a state must transfer partial decision-making authority to federal regulators.⁸⁴ If the fifty states are in competition for these funds, then the states that are most willing to surrender some of their autonomy will be the ones that acquire the most federal money. Therefore, those states that are most willing to surrender some aspects of their sovereignty will be the states that maximize the welfare of their inhabitants. To borrow from a concept in corporate law, there will be a "race to the bottom" in order to attract federal funds.⁸⁵ But unlike the race to the bottom theory, this destructive competition arises not from state efforts to attract private commercial activity, whether it be business incorporations or industrial plants, but from state efforts to attract federal largess and support.

Judicial review provides an important check on the temptation to surrender state sovereignty voluntarily. To some extent, judicial review may guard against the threat of legislative instability predicted by Arrow's Theorem⁸⁶ or the possibility of unconstitutional actions taken in the states in the heat of emotion.⁸⁷ Just as importantly, however, judicial review prevents states that are fully informed from sacrificing their sovereignty for some greater financial gain. Put

83. See *supra* notes 76-79 and accompanying text.

84. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (statute conditioning receipt of federal highway funds on adoption of minimum drinking age was valid use of Congress' spending power).

85. Whether such a race to the bottom exists in corporate law, or other areas of law, due to the competition among states, is open to debate. See, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Judge Ralph Winter, *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1971).

86. Arrow's Theorem, named for its creator, Kenneth Arrow, states that "public interest" cannot be possible if it means satisfying a combination of varying preferences of voters. See FARBER & FRICKEY, *supra* note 67, at 38-62.

87. James Madison wrote in *Federalist No. 62* concerning the "propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions" and the problem of "mutability in the public councils." THE FEDERALIST NO. 62, at 315 (James Madison) (Garry Wills ed., Bantam 1982).

in public choice terms, federalism and the maintenance of a federal government of limited, enumerated powers may be a positive externality that no individual state acting individually or collectively fully internalizes. In this sense, the framers viewed federalism as a normative good which ought to be promoted despite any state's momentary interest in trading away its rights.

In this regard, the framers' decision to use judicial review to enforce federalism provides new insights for the ongoing discussion concerning the value of federalism. In recent years, there has been renewed interest in legal scholarship concerning the costs and benefits of federalism. Supporters of a rejuvenated respect for state sovereignty argue that states can bring important advantages to the execution of good public policy. First, federalism is a decentralized decision-making system that is more responsive to local interests and preferences.⁸⁸ States can tailor programs to local conditions and needs and can act as innovators in creating new programs.⁸⁹ Economists have found that under certain conditions, smaller governments can provide a more efficient allocation of resources that maximizes the well-being of their citizens.⁹⁰ State governments compete for households and businesses by enacting efficient policies; in the long-run this competition produces overall efficiency.⁹¹ Indeed, for much of our nation's history, the states did play the primary role in developing economic programs designed to enhance their citizens' welfare.⁹² Recent writing has also stressed that a decentralized state system enhances democracy, either by increasing political participation at the state and local level

88. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8 (1988).

89. See McConnell, *supra* note 88, at 1495-1500; Merritt, *supra* note 88, at 8-10. For a useful exposition of the pro-federalism arguments, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 58-106 (1995).

90. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). I have relied upon the works of my colleague, Daniel Rubinfeld, to guide the way through the economics literature on federalism. See Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997); Daniel L. Rubinfeld, *The Economics of the Local Public Sector*, in 2 ALAN J. AUERBACH & MARTIN FELDSTEIN, *HANDBOOK OF PUBLIC ECONOMICS* 571 (1987).

91. Of course, for this to be true, a number of conditions must exist: 1) publicly provided goods and services are provided at minimum average cost; 2) a perfectly elastic supply of jurisdictions exists; 3) households and businesses have full information about each jurisdiction's policies; 4) mobility is costless; 5) no interjurisdictional externalities or spillovers exist. See Inman & Rubinfeld, *supra* note 90, at 1241-45.

92. See, e.g., Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 132 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978); Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & SOC'Y REV. 57, 72-118 (1975).

or by reducing the opportunities of powerful interest groups to receive rent-seeking legislation at the national level, thereby increasing the costs of passing such legislation.⁹³

As noted earlier, however, the framers believed that the chief role states would play in their relationship with the federal government would be the protection of the people's liberty.⁹⁴ Although limiting the power of the federal government might produce inefficiencies, the framers believed that this cost was necessary to guard against potential tyranny by a federal government filled with self-interested, ambitious politicians. In this sense, the framers' discussions indicated their belief that federalism brought advantages by diffusing power. To be sure, creating different power centers and decentralizing decision-making authority can be different things. Indeed, my colleagues Malcolm Feeley and Ed Rubin have argued that many of the benefits observers commonly associate with federalism are those that arise from the decentralization of power, and that states serve only as convenient administrative divisions.⁹⁵ No doubt they are correct on this point, but they overlook the crucial benefit that states bring because of their independent sovereignty. As separate political units, states can oppose the exercise of power by the national government, even if the national government and the people believe that centralization of power at that moment is good public policy. By allowing, or even encouraging, the federal and the state governments to check each other, the framers' Constitution seeks to create an area of liberty that cannot be regulated by either government. Dividing political power between the two levels of government appears even more effective in light of the presence of a separation of powers in both governments. As James Madison wrote in *Federalist No. 51*, "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments."⁹⁶ Because of the combined force of federalism and of the separation of powers, "a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself."⁹⁷

As I argued earlier, the framers did envision that individual liberties would receive protection through the competition between federal and state governments to provide rights to their citizens.⁹⁸ But this was not the only way, in the framers' minds, that federalism would become the shield of liberty. Freedom also would arise from the inefficiencies that the framers built into the federal system itself. The nation's governments simply would not be able to regulate all the issues of life because, even if they could overcome the internal checks created by their separation of powers, their external powers would come into conflict and cancel each other out. In a sense, this conclusion is somewhat

93. See Macey, *supra* note 74.

94. See *supra* note 14 and accompanying text.

95. See generally Rubin & Feeley, *supra* note 10.

96. THE FEDERALIST NO. 51, at 264 (James Madison) (Garry Wills ed., Bantam 1982).

97. See *id.*

98. See *supra* Part I.

at odds with the public choice approach to federalism sketched above, because in this conception federalism does not exist purely to advance efficiency. Instead, in some cases federalism can prevent the national government from enacting policies that produce national benefits that outweigh the costs.

The framers believed this deliberate inefficiency to be necessary in order to protect liberty. An absence of judicial review over federalism questions, however, would abort the framers' design. The framers created judicial review in order to prevent any of the branches or levels of government from exceeding the written limitations on their powers. The federal courts would prevent the states from frustrating the legitimate exercise of national power, and, on the flip side of the coin, they would block the national government from infringing upon the independent sovereignty of the states. From this clashing of institutional interests, the framers hoped that liberty would result. Ironically, by creating a theory designed to protect individual rights at the expense of federalism, the advocates of the Political Safeguards Theory of Federalism may have undermined the framers' most effective mechanism for guarding individual freedom.

WHOSE FEDERALISM?

S. ELIZABETH WILBORN MALLOY*

INTRODUCTION

In his Article, *Sounds of Sovereignty*, Professor John Yoo makes a persuasive argument based on recent jurisprudence that the Supreme Court is once again reviewing federal legislation for federalism concerns.¹ Professor Yoo applauds this trend, which he believes will lead to greater protection for individual liberty and state autonomy, and contends that the Court should continue to review congressional statutes for compliance with federalism mandates.

Though he favors the renewed emphasis that the Supreme Court has placed on protecting state autonomy, Professor Yoo concedes that there could be a flaw in the Court's jurisprudence—specifically, its failure to define coherently a comprehensive yet viable federalism theory. He is correct to recognize the need for a complete theory. The Court's failure to develop a workable federalism theory was a principle reason the Court for many years stopped reviewing legislation for federalism concerns.² In the absence of established guidelines for reviewing legislation, the Court was and will be vulnerable to the charge that it makes decisions based on the desired political outcome. Relying on his extensive study of the writings of the early federalists, Professor Yoo argues that the Court's theory should be based on an underlying value, the protection of individual liberty. This presumes that the Court's new approach actually supports this underlying concern. Unfortunately, the current federalism cases appear to undermine individual liberty, and thus Professor Yoo's argument as well.³

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1. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998) [hereinafter *Sounds of Sovereignty*]; see also John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) [hereinafter *Judicial Safeguards*].

2. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-551 (1985) (discussing lack of federalism theory under, and overruling, *National League of Cities v. Usery*, 426 U.S. 833 (1976)). See also Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 10-11 (1988) (asserting Supreme Court's recent failure in protecting state sovereignty stems from inconsistent rulings); William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1713, 1732-33 (1985) (recognizing Supreme Court's long period of refusal to strike down acts of Congress on pure federalism grounds).

3. *Sounds of Sovereignty*, *supra* note 1, at 28, 34-38, 42-44. In *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991), the Court held that Missouri state court judges were "appointees on the policymaking level," and, thus, were excluded from the Age Discrimination Employment Act ("ADEA"). Before reaching this conclusion, the Court described its view on the role of the states in the federal system. The Court, speaking through Justice O'Connor, declared that the "principal

I agree with much of Professor Yoo's argument. The *Garcia*⁴ Court's complete abandonment of federalism concerns left little protection for the states against an increasing number of federal legislative mandates.⁵ It is right that the Court should develop a comprehensive federalism theory when determining whether federal legislation is applicable to the states.

I disagree, however, with Professor Yoo's contention that support for individual liberty is the basis for or supported by the current federalism jurisprudence. As a result of the Court's new federalism, state governments have a strong argument that many civil rights laws no longer apply to them.⁶ Those individuals who benefit from these laws, e.g., the aged,⁷ the disabled,⁸ and hourly wage earners⁹ have actually seen individual liberty suffer under the new

benefit of the federalist system is a check on abuses of government power." *Id.* at 458. For this system to be effective, "there must be a proper balance between the States and the Federal Government." *Id.* at 459. The employee, like that in *Gregory*, challenging a state's decision to terminate her employment because of her age, faces this Court's conviction about federalism. *See also* *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (O'Connor, J., concurring) (stating that "the more challenging task of crafting appropriate procedures for safeguarding [a class of persons'] liberty interests is entrusted to the 'laboratory' of the States in the first instance.") (citation omitted).

4. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

5. *See generally* Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457 (1997) (reviewing the rise of state constitutional law and its impact on individual liberty enhancement and federalism).

6. Justice Stevens, dissenting in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), read the Court's decisions as preventing "Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." *Id.* at 77 (Stevens, J., dissenting). He pointed out that in areas of exclusive federal jurisdiction—copyright, bankruptcy and antitrust—affording the states Eleventh Amendment immunity from federal court liability effectively leaves persons injured by state violations without a judicial remedy. *Id.* at 77 n.1.

7. *See Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998) (holding that the Eleventh Amendment bars ADEA suits filed in federal court against state entities); *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (holding that states are immune from suit under the ADEA because of the Eleventh Amendment); *but see Keeton v. University of Nev. Sys.*, 150 F.3d 1055, 1058 (9th Cir. 1998) (holding that "Congress abrogated the states' immunity in amending the ADEA pursuant to its Fourteenth Amendment enforcement authority"); *Goshtasby v. Board of Trustees*, 141 F.3d 761 (7th Cir. 1998) (holding that the ADEA abrogates state's immunity from suit); *Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540 (10th Cir. 1997) (holding that the state's immunity from suit was abrogated under the ADEA).

8. *See Garrett v. Board of Trustees of the Univ. of Ala.*, 989 F. Supp. 1409 (N.D. Ala. 1998); *Brown v. North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451 (E.D.N.C. 1997); *Nihiser v. Ohio Env'tl. Protection Agency*, 979 F. Supp. 1168 (S.D. Ohio 1997).

9. *See Mills v. Maine*, 118 F.3d 37, 48 (1st Cir. 1997) (holding that the Fair Labor Standards Act does not apply against the states); *Larry v. Board of Trustees of the Univ. of Ala.*,

federalism. The Court appears to have forgotten that the federal government can play an important role in safeguarding liberty by helping prevent discrimination. These laws must necessarily be valid against state governments in order to provide equivalent protection of basic rights for all citizens. The new federalism decisions limit Congress' ability to deter discrimination by state or local government.

To highlight the harmful effects of the new jurisprudence, this Article examines some of the recent state challenges to the applicability of the Americans with Disabilities Act ("ADA").¹⁰ Some state governments have already successfully challenged the applicability of the ADA to state entities.¹¹ Although the ADA's application to private actors is not in doubt,¹² lower courts have begun to split over whether it can be enforced against states.¹³ States have argued that they are immune from the ADA's nondiscrimination and accommodation requirements because Congress did not have the power to abrogate the states' Eleventh Amendment immunity from suit in federal court. Congress' power to override state Eleventh Amendment immunity has been seriously limited by two of the recent Supreme Court federalism decisions: *Seminole Tribe of Florida v. Florida*¹⁴ and *City of Boerne v. Flores*.¹⁵ Although

975 F. Supp. 1447, 1450 (N.D. Ala. 1997) (holding that the Equal Pay Act does not apply against the states); *but see* Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998) (holding that Congress acted within its authority under Section 5 of the Fourteenth Amendment when it abrogated states' Eleventh Amendment immunity from suits under the Equal Pay Act); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997) (holding that congress validly abrogated state's immunity from suit under the Equal Pay Act).

10. Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified primarily at 42 U.S.C. §§ 12101-12213 (1994 & Supp. I 1995 & Supp. II 1996)).

11. *See supra* note 8 and accompanying text.

12. *See* Abbott v. Bragdon, 118 S. Ct. 2196 (1998) (holding Title III valid under the Commerce Clause as applied to a dentist); United States v. Morvant, 898 F. Supp. 1157, 1168 (E.D. La. 1995) (enjoining defendant dentist from refusing treatment on basis of HIV status); Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 579 (S.D. Cal. 1993) (holding that Title III of the ADA, which regulates public accommodations, is a proper exercise of the Commerce Clause power as applied to a restaurant).

13. *See* Garrett, 989 F. Supp. at 1410 (agreeing with the court in *Nihiser*); Brown, 987 F. Supp. at 457-59 (holding that the ADA as a whole is not valid under the Fourteenth Amendment); *Nihiser*, 979 F. Supp. at 1176 (holding that the ADA's reasonable accommodation requirement is not valid under the Fourteenth Amendment). *But see* Autio v. AFSCME, Local 3139, 140 F.3d 802 (8th Cir. 1998) (holding enactment of the ADA was attempt by Congress to enforce Fourteenth Amendment equal protection, and is clearly adapted to that end); Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997) (holding that the ADA is valid under the Fourteenth Amendment), *cert. denied*, 118 S. Ct. 2340 (1998); Martin v. Kansas, 978 F. Supp. 992, 996 (D. Kan. 1997) (concluding Congress validly exercised its enforcement power under the Fourteenth Amendment in abrogating states' immunity under ADA).

14. 517 U.S. 44 (1996).

15. 117 S. Ct. 2157 (1997).

these two cases deal with the power of the federal courts to enforce federal law against state government, they also concern the power of individuals to vindicate federally-mandated rights in federal court. Though they may ease states' burdens, these decisions also constrict the individuals' ability to go to federal court to protect themselves under federal law against state discrimination.

This Article examines briefly the *Seminole Tribe* and *City of Boerne* decisions. Part II then focuses on the ADA and the reasons why Congress made it applicable to government conduct as well as private conduct. Finally, Part III examines the argument, based on the new federalism, that the ADA should not apply to state entities. It does not appear that the Court's new federalism has had a liberty-enhancing effect for some of the most vulnerable persons in our society. The Court's revitalized federalism jurisprudence has led to questions about the continuing validity of many of our civil rights statutes as applied against the states.

I. THE SUPREME COURT'S NEW NEW FEDERALISM—LIMITING CONGRESS' POWER TO ABROGATE STATE IMMUNITY

In light of recent Supreme Court decisions, the Eleventh Amendment may now be a barrier to ADA suits brought against state governments. The Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹⁶ Although a literal reading of the Amendment would not appear to bar a citizen from bringing suit against his state in federal court,¹⁷ the Supreme Court has long held the Amendment indeed prohibits such suits.¹⁸ By granting state immunity from suit in federal court, the Eleventh Amendment limits the ability of Congress to regulate state conduct.

The Supreme Court's interpretation of the Eleventh Amendment does not entirely bar the litigation of discrimination claims against the states in federal courts. The Eleventh Amendment does not bar suits in federal court against individuals who are state officials, although the extent of this limitation depends to some degree on whether the individuals are sued in their "personal" or

16. U.S. CONST. amend. XI.

17. The Amendment refers only to citizens of other states and foreign citizens. U.S. CONST. amend. XI.

18. See *Hans v. Louisiana*, 134 U.S. 1, 21 (1890). Similarly, although the Eleventh Amendment refers only to suits in law and equity, the Court has also held that the Amendment bars suits in admiralty. See *New York Pet. of Walsh*, 256 U.S. 490, 497 (1921) (barring *in personam* suit in admiralty); *New York Pet. of The Queen City*, 256 U.S. 503, 510 (1921) (barring *in rem* suit against vessel owned by the state).

“official” capacities.¹⁹ “Since *Ex parte Young*,^[20] . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law.”²¹ Also, the Eleventh Amendment only bars retrospective relief, not prospective injunctive relief.²²

Because the Eleventh Amendment aims to preserve the sovereign immunity of the states, it is no broader than the sovereign immunity asserted by a state. To the extent that a state has waived its immunity, the state is subject to suit in federal court.²³

Of most significance in the context of the ADA, Congress has historically had the power to abrogate Eleventh Amendment immunity by a sufficiently clear legislative statement,²⁴ when it acted within power conferred by the U.S.

19. See *Hafer v. Melo*, 502 U.S. 21, 29 (1991) (explaining relationship between 42 U.S.C. § 1983 (Supp. II 1996) and Eleventh Amendment; liability of public officials sued in their personal capacities under section 1983 and Eleventh Amendment is not limited to acts outside their authority or not essential to state government but also extends to official acts).

20. 209 U.S. 123 (1908).

21. *Hafer*, 502 U.S. at 30 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984)). The application of the Amendment is guided by its purpose, which is to prevent “private parties seeking to impose a liability which must be paid from public funds in the state treasury.” *Id.* (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)).

22. See *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F. Supp. 583, 594 (N.D. Cal. 1994).

23. See *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 778-82 (1991) (reviewing relationship between Eleventh Amendment and sovereign immunity); see also *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (holding that state waives Eleventh Amendment immunity by accepting federal funds where the funding statute manifests a clear intent to waive constitutional immunity), *cert. denied*, 118 S. Ct. 2340 (1998). Cf. *Nihiser v. Ohio Env'tl. Protection Agency*, 979 F. Supp. 1168, 1169 (S.D. Ohio 1997) (finding mere fact that state participates in program through which United States government provides funding to state is not sufficient to establish state's consent to suit).

24. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-43 (1985) (refusing even to consider evidence from the legislative history of the Rehabilitation Act suggesting that Congress intended that statute to constitute an exercise of its Section 5 abrogation power, and stating that “Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”). The year following the Court’s decision in *Atascadero*, Congress passed the Rehabilitation Act Amendments of 1986, expressly indicating its intent to subject the states to suit under the Rehabilitation Act as well as “any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.” 42 U.S.C. § 2000d-7(a)(1) (1994). For commentary critical of the clear statement rule, see, for example, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 621-23, 629-45 (1992) (criticizing clear statement rules in general, and also noting that the Court “played a kind of ‘bait and switch’ trick on Congress” by applying *Atascadero*’s clear statement rule even to older federal

Constitution.²⁵ The abrogation power is strongest when Congress legislates under the power given it by Section 5 of the Fourteenth Amendment.²⁶ In *Pennsylvania v. Union Gas Co.*,²⁷ the Supreme Court, in a plurality opinion, held that Congress also has the authority under the Commerce Clause to abrogate Eleventh Amendment immunity.²⁸ It is this holding that the Court reversed in *Seminole Tribe of Florida v. Florida*.²⁹

statutes); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 77-91 (1990). *But cf.* George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 388 (1985) (defending the clear statement rule because it “ensures that Congress knew what it was doing” in the abrogation context, and, in the case of implied waiver, “provides the additional assurance that the state knows what it is getting into”); Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 401-19 (1991) (defending the clear statement rule on a number of grounds).

25. See *Blatchford*, 501 U.S. at 788 (rejecting argument that 28 U.S.C. § 1362 (1994) did not abrogate Eleventh Amendment immunity for suits by Indian tribes). The Supreme Court first recognized Congress’ power to abrogate the states’ Eleventh Amendment protection without their consent in its 1976 decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). In that case, a sex discrimination suit brought by state employees under Title VII of the Civil Rights Act of 1964, the Court unanimously held that “the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment” and that Congress therefore has the power to abrogate the Eleventh Amendment when acting pursuant to Section 5. *Fitzpatrick*, 427 U.S. at 456 (citations omitted). The Court reasoned that the Fourteenth Amendment, enacted as part of the wholesale restructuring following the Civil War, contemplated a “shift in the federal-state balance” and thus “sanctioned intrusions by Congress . . . into the judicial, executive, and legislative spheres of autonomy previously reserved to the States”—including the authorization of suits that would be “constitutionally impermissible in other contexts.” *Id.* at 455-56. The Court explained:

When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is “appropriate legislation” for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials.

Id. at 456 (citations omitted).

26. See *Fitzpatrick*, 427 U.S. at 456. Congress has the power to enforce the provisions of the Fourteenth Amendment “by appropriate legislation.” U.S. CONST. amend. XIV, § 5.

27. 491 U.S. 1 (1989).

28. *Id.* at 13-14.

29. 517 U.S. 44, 63-64, 66 (1996). See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to “regulate Commerce with foreign Nations, and among the several States”); see also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-15 (1989) (plurality opinion), *overruled by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). In *Seminole Tribe*, the Court overturned the seven-year-old ruling in *Union Gas*, holding this time that Congress does not have the power to abrogate the states’ Eleventh Amendment immunity when acting under Article I. Noting that “we

In *Seminole Tribe*,³⁰ Chief Justice Rehnquist, writing for a five-to-four majority,³¹ held that Congress could not abrogate state immunity under any of its Article I powers, including the Indian Commerce Clause and the Commerce Clause.³² Specifically, the Court struck down a provision in the Indian Gaming Regulatory Act ("IGRA")³³ that authorized Native American tribes to bring suit in federal court against states that failed to negotiate in good faith with tribes seeking to enter into compacts governing the operation of certain gambling activities.³⁴

always have treated *stare decisis* as a 'principle of policy,' and not as an 'inexorable command,'" the *Seminole Tribe* majority dismissed *Union Gas* as a "deeply fractured decision" and "a solitary departure from established law." *Seminole Tribe of Fla. v. Florida*, 517 U.S. at 63-64, 66 (citations omitted). Specifically, the Court held that "'the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III'" that is "not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." *Id.* at 68, 72 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984)).

30. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). *Seminole Tribe* involved legislation passed pursuant to the Indian Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. The Seminole Tribe filed suit against the states of Florida and Alabama to compel negotiations under the Indian Gaming Regulatory Act. *See Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1018 (11th Cir. 1994). The U.S. District Court for the Southern District of Florida denied that state's motion to dismiss, while the District Court for the Southern District of Alabama granted the motion to dismiss. *Id.* The Court of Appeals held that Congress could not abrogate the states' sovereign immunity under the Indian Commerce Clause, distinguishing Congress' power under the Indian Commerce Clause from the Commerce Clause. *Id.* at 1028.

31. Chief Justice Rehnquist wrote the opinion for the Court, which was joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justice Souter filed a lengthy dissenting opinion in which Justices Ginsburg and Breyer joined. *Seminole Tribe*, 517 U.S. at 100 (Souter, J., Ginsburg, Breyer, JJ., dissenting). Justice Stevens wrote a separate dissenting opinion. *Id.* at 76 (Stevens, J., dissenting).

32. *Id.* at 72-73. The Court also dismissed the portion of the Tribe's suit naming the Governor as a defendant. *Id.* at 76. Although the *Ex parte Young* exception to the Eleventh Amendment does not bar a suit against a state official seeking prospective injunctive relief, *see supra* notes 23-25 and accompanying text, the Court explained that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74. Given the statute's repeated references to "the State," the Court concluded that Congress did not intend to create a cause of action against individual state officials. *Id.* at 75 n.17. This portion of the *Seminole Tribe* decision has received mixed reviews. *Compare* David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547 (1997) (defending the Court's position), *with* Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 510-41 (1997) (criticizing the Court).

33. 25 U.S.C. §§ 2701-2721 (1994).

34. *Id.* § 2710(d)(3)(A).

To determine if federal legislation abrogated a state's sovereign immunity, the *Seminole Tribe* opinion required two determinations: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' and second, whether Congress has acted 'pursuant to a valid exercise of power.'"³⁵ The Court answered the first inquiry in the affirmative. The Court observed that the IGRA's statutory language indicated a clear congressional intent to abrogate the Eleventh Amendment, thereby satisfying the clear statement rule.³⁶ However, the Court concluded that Congress lacked the power to abrogate the Eleventh Amendment when legislating under its Article I powers.³⁷

Given the centrality of the Commerce Clause to Congress' expansive legislative reach,³⁸ the *Seminole Tribe* precedent seriously curtailed federal legislative authority.³⁹ After *Seminole Tribe*, the Fourteenth Amendment Section 5 enforcement power stands as the sole recognized source of congressional authority to abrogate state immunity.⁴⁰

The Fourteenth Amendment provides, in relevant part, that no state may "deny to any person within its jurisdiction the equal protection of the laws."⁴¹

35. *Seminole Tribe*, 517 U.S. at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

36. *Id.* at 56.

37. *Seminole Tribe*, 517 U.S. at 72-73.

38. See *Perez v. United States*, 402 U.S. 146, 150 (1971) (explaining that the Commerce Clause gives Congress the power to regulate the channels and instrumentalities of interstate commerce, people, and articles moving in interstate commerce, and activities affecting commerce); Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L. Q. 901, 912 (1987) (describing the expansion of Congress' power under the Commerce Clause). But see *United States v. Lopez*, 514 U.S. 549, 559 (1995) (explaining that Congress cannot regulate intrastate activities under the Commerce Clause unless they "substantially affect" interstate commerce).

39. For a discussion of the dramatic impact that *Seminole Tribe* has had on the enforcement of the ADEA in federal courts against the states, see Edward P. Noonan, *The ADEA in the Wake of Seminole*, 31 U. RICH. L. REV. 879 (1997).

40. In fact, the *Seminole Tribe* Court distinguished the Fourteenth Amendment on three grounds: it was adopted "well after the adoption of the Eleventh Amendment," its prohibitions are "expressly directed at the States," and it "fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe*, 517 U.S. at 59, 65. See also *Nihiser v. Ohio Env'tl. Protection Agency*, 979 F. Supp. 1168, 1170 (S.D. Ohio 1997) ("[T]he only currently recognized authority for Congress to abrogate the states' sovereign immunity . . . consists of Congress' enactment of legislation pursuant to its enforcement powers under § 5 of the Fourteenth Amendment."). But see *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 n.9 (1st Cir. 1996) (holding that Congress has the power to abrogate the Eleventh Amendment when acting under its war powers, U.S. CONST. art. I, § 8, cls. 1, 11-16, concluding, without explanation, that *Seminole Tribe* "does not control the War Powers analysis.").

41. U.S. CONST. amend. XIV, § 1. The original purpose of the Fourteenth Amendment was to abolish the official practice of racial discrimination. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439

Section 5 of the Fourteenth Amendment provides Congress with explicit authority to enforce the guarantees of that amendment and to enact legislation specifically addressing conduct that violates the Equal Protection Clause.⁴² Prior to *City of Boerne v. Flores*,⁴³ the Supreme Court had been divided over the scope of Congress' Section 5 enforcement power.⁴⁴ In *Katzenbach v. Morgan*,⁴⁵ Justice Brennan, writing for the majority, interpreted Section 5 to authorize Congress to provide protection for substantive rights that the Fourteenth Amendment, as interpreted by the Supreme Court, did not require.⁴⁶ The Court held that Section 4(e) of the Voting Rights Act of 1965,⁴⁷ which invalidated English literacy requirements, was a valid exercise of Section 5.⁴⁸ The Court upheld the Act despite its earlier holding in *Lassiter v. Northampton County Board of Elections*,⁴⁹ that such literacy tests did not violate the Fourteenth Amendment.⁵⁰ The *Morgan* Court explained that it was upholding Congress' power to define a violation of the Equal Protection Clause because Section 5 is a "positive grant of legislative power" that allows Congress to determine independently what legislative action is necessary to enforce the Fourteenth Amendment.⁵¹ This approach has been called the "ratchet" theory because it permits Congress to increase, but not decrease, the Fourteenth Amendment's protections.⁵² The *Morgan* Court reasoned,

It was for Congress, as the branch that made this judgment, to assess and

(1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). In other words, the clause limits the ability of legislatures to classify individuals into groups for the purposes of subjecting them to dissimilar treatment under the law. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, at 1439 n.22 (2d ed. 1988) (noting that legislative classifications are the focus of equal protection); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209 (1997).

42. U.S. CONST. amend. XIV, § 5.

43. 117 S. Ct. 2157 (1997).

44. See *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

45. 384 U.S. 641 (1966).

46. *Id.* at 653-56.

47. 42 U.S.C. §§ 1971, 1973-1973gg-8 (1994).

48. *Morgan*, 384 U.S. at 643.

49. 360 U.S. 45 (1959).

50. *Morgan*, 384 U.S. at 649.

51. *Id.* at 651. See Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299, 302 (1982).

52. *Morgan*, 384 U.S. at 651 n.10 (explaining that Congress may act only to enforce, not "restrict, abrogate or dilute" the Fourteenth Amendment). See also Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 202 (1992) (explaining the ratchet theory as applied to the ADA).

weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.⁵³

Although the “ratchet” theory had been criticized in subsequent Supreme Court decisions, it had not been expressly rejected by a majority of the Court.⁵⁴ In *City of Boerne v. Flores*,⁵⁵ the Court clearly indicated that Congress could not alter the substantive protections of the Fourteenth Amendment.⁵⁶ *City of Boerne* addressed the constitutionality of the Religious Freedom Restoration Act (“RFRA”),⁵⁷ which directed courts to apply a strict scrutiny standard to laws that substantially burden an individual’s exercise of religion.⁵⁸ Congress enacted RFRA in response to the Supreme Court’s holding in *Employment Division v.*

53. *Morgan*, 384 U.S. at 653.

54. See *EEOC v. Wyoming*, 460 U.S. 226, 261-62 (1983) (Burger, C.J., dissenting) (arguing that the ADEA was invalid under Section 5 of the Fourteenth Amendment because the Court had expressly ruled that age is not a suspect class and thus, Congress could not override state laws that satisfy the rational basis test as age discriminatory); *Oregon v. Mitchell*, 400 U.S. 112, 296 (1970) (Stewart, J., concurring in part and dissenting in part) (arguing that the Voting Rights Act provision that lowered the voting age in national and state elections to 18 would be “valid only if Congress has the power not only to provide the means of eradicating . . . a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause”).

55. 117 S. Ct. 2157 (1997). The *City of Boerne* case arose when St. Peter Church outgrew its facility, a 1920s imitation Spanish mission style structure in the City of Boerne, Texas. *Id.* at 2160. Although the church itself is not a historic landmark, the front facade is located within a historic district. The city refused to approve any plan of expansion that would require demolition of any part of the church building, whether inside or outside the historic district. Raising claims under both RFRA and the First Amendment, the Archbishop of San Antonio sued the city on behalf of the church. *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996).

56. *City of Boerne*, 177 S. Ct. at 2167. (“Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.”). The court emphasized this point later at the end of its opinion:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later case and controversies the Court will treat its precedents with the respect due them under settled principles . . . and contrary expectations must be disappointed.

Id. at 2172.

57. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

58. *Id.* § 2000bb-1.

Smith,⁵⁹ which upheld a state law criminalizing the use of peyote for any purpose, including religious ceremonies.⁶⁰ In *Smith*, the Court held that absent any intent to discriminate on the basis of religion, state laws of general applicability are valid even when they interfere with religious practices.⁶¹

In *City of Boerne*, with a 6-3 opinion written by Justice Kennedy, the Supreme Court held RFRA was beyond Congress' power under the Fourteenth Amendment.⁶² Based on the Court's reading of the Fourteenth Amendment's history,⁶³ the Court put to rest *Morgan's* implication that Congress had the power to expand the rights guaranteed by the Fourteenth Amendment.⁶⁴ Instead, the Court explained, the enforcement power is remedial, and therefore must be limited to preventing or alleviating actual constitutional violations.⁶⁵ To prevent Congress from using this power to enact general legislation unrelated to enforcement of the Fourteenth Amendment, the Court announced that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁶⁶ In so doing, the Court recognized that there is no clear categorical difference between legislation that prevents Fourteenth Amendment violations and legislation that creates new rights not found in the Constitution.⁶⁷ *City of Boerne* imposes a balancing test that requires a comparison of two factors: the extent of the constitutional injury a law is meant to address and the level of intrusion that the law imposes on states.⁶⁸

59. 494 U.S. 872 (1990).

60. *Id.* at 878-79.

61. *Id.*

62. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997).

63. *Id.* at 2164-66 (noting that an earlier draft of the Fourteenth Amendment encountered broad opposition because it granted too much power to Congress).

64. *Id.* at 2168.

65. *Id.* at 2164.

66. *Id.* Such a relationship is needed, the Court said, because "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." *Id.*

67. The Court reaffirmed the proposition, however, that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 2163. Although Congress' legislative reach under the Fourteenth Amendment is thus somewhat broader than the Amendment itself, the Supreme Court has not expressly held that Congress' power to enforce the Fourteenth Amendment extends to regulating private conduct. See Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 210 & n.46 (discussing Congress' expansive Fourteenth Amendment power). The Fourteenth Amendment itself only applies to state action. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). In the *Civil Rights Cases*, the Court held that Congress cannot reach private conduct when enacting laws pursuant to the Fourteenth Amendment. *Id.*

68. *City of Boerne*, 117 S. Ct. at 2170. Under *City of Boerne*, therefore, the reach of the enforcement power depends on the prevalence of constitutional violations. The Court explained: "The appropriateness of remedial measures must be considered in light of the evil presented . . .

Noting that the congressional record contained little mention of state laws enacted for the purpose of discriminating on religious grounds and few instances of purposeful religious discrimination, the Court concluded that RFRA bore little relation to any constitutional injury.⁶⁹ The Court concluded that Congress was not primarily concerned about intentional discrimination when it enacted RFRA.⁷⁰ Instead, the Court determined that Congress' principal desire was to alleviate the incidental burdens on religious practice that otherwise valid laws may impose.⁷¹ Lacking a connection to a constitutional injury, the Court concluded that the right created by RFRA, to be free from the application of burdensome state laws, was a new right not found in the Constitution.⁷² After *City of Boerne*, Section 5 of the Fourteenth Amendment apparently only authorizes Congress to provide remedies for judicially-determined constitutional violations. In addition, in preparing legislation to remedy Fourteenth Amendment violations, Congress must make fairly detailed findings in the legislative record of unconstitutional behavior to satisfy the new *City of Boerne* congruence and proportionality standard.⁷³

II. AMERICANS WITH DISABILITIES ACT

When Congress passed the Americans with Disabilities Act⁷⁴ in 1990, it

Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one," and "[p]reventative measures . . . may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *Id.* at 2169-70.

69. *Id.*

70. *Id.* at 2169. In holding the RFRA congressional record inadequate, the Court distinguished the earlier Voting Rights cases, "[i]n contrast to the record which confronted Congress and the judiciary in the Voting Rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.*

71. *Id.*

72. *Id.* at 2170.

73. *Id.* at 2164 (requiring "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

74. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified primarily at 42 U.S.C. §§ 12101-12213 (1994 & Supp. I 1995 & Supp. II 1996)). Congress set forth its findings in the text of the statute that:

individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101(a)(5) (1994). For an excellent overview of the ADA, see LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* §§ 1.05, 4.06 (2d ed. 1997).

noted that there were 43 million Americans with physical or mental disabilities.⁷⁵ After fourteen hearings held by the Congress on the ADA, and as a result of the sixty-three field hearings and the hundreds of discrimination diaries submitted for the legislative record by persons with disabilities,⁷⁶ Congress found that these disabled persons suffered severe prejudice and discrimination.⁷⁷ In addition, Congress observed that people who suffered discrimination because of a disability often had no legal remedies,⁷⁸ unlike members of other constitutionally

75. 42 U.S.C. § 12101(a)(1) (1994).

76. *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 253-54 (1989) (testimony of Justin Dart, Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities).

77. The Senate report resulting from hearings on the ADA, *see supra* note 77 and accompanying text, acknowledged that

[o]ur society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination.

S. Rep. No. 101-116, at 8-9 (1989) (referring to previous testimony by Justin Dart, Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities). For persons with mental disabilities in particular, the extensive history of discrimination is even more disturbing. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461-64 (1985) (Marshall, J., concurring in part and dissenting in part) (summarizing history of purposeful discrimination against individuals with mental disabilities); ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* 353 (2d ed. 1949) (noting that at the turn of the century “the feeble-minded person was looked upon as a parasite on the body politic who must be mercilessly isolated or destroyed for the protection of society”). *See generally* Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 399-414 (1991) (discussing the historical segregation, isolation, and degradation of the disabled in this country).

78. Prior to enactment of the ADA, the rights of persons with disabilities were protected incompletely. *See* Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 64 TEMPLE L. REV. 375, 377 (1991) (“The ADA overcomes our past failure to eliminate attitudinal, architectural, and communication barriers in employment, transportation, public accommodations, public services, and telecommunications.”). For example, the Rehabilitation Act of 1973 only provided disabled persons with protection against discrimination by federally funded entities, and was not enforceable against state or local governments or private entities that did not receive federal funds. Pub. L. No. 93-112, 87 Stat. 390 (1973) (codified as amended at 29 USC § 790 (1994), *repealed by* Pub. L. No. 102-569, 106 Stat. 4424 (1992), and 29 U.S.C. §§ 791-794 (1994 & Supp. II 1996), *amended by* Pub. L. No. 105-220, 112 Stat. 936 (1998)). Thus, persons with disabilities had no protection from discrimination in many areas, including state and local activities and services. *See* Thornburgh, *supra* at 377 n.9 (Title V of the Rehabilitation Act expressly applies only to recipients of federal funds, federal employers, and federal contractors); *see also* Nancy Lee Jones, *Overview and Essential Requirements of the Americans With Disabilities Act*, 64 TEMPLE L. REV. 471, 475-76 (1991).

or statutorily protected groups.⁷⁹ Congress also learned that the discrimination disabled persons suffered was many times intentional, and implemented through official state action that legislatively deemed persons with disabilities “unfit for citizenship.”⁸⁰

Based on this data, Congress set forth detailed legislative findings in the ADA, asserting that disabled individuals are a “discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals.”⁸¹ To eradicate this discrimination, Congress “invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate

79. 42 U.S.C. § 12101(a)(4) (1994).

80. Cook, *supra* note 77, at 400 (citing 1920 Miss. Laws 294, ch. 210, § 17) (noting that chancery courts have jurisdiction in cases of legal inquiry in regard to feeble-mindedness which renders persons unfit for citizenship). Many states had laws that officially required the segregation of persons with disabilities, allegedly for the benefit of society, and “to relieve society of ‘the heavy economic and moral losses arising from the existence at large of these unfortunate persons.’” *City of Cleburne*, 473 U.S. at 462-63 n.9 (Marshall, J., concurring in part and dissenting in part) (quoting Act of March 22, 1915, ch. 90, 1915 Tex. Gen. Laws 143, (repealed 1955)). See also 1919 Fla. Laws 231, 234, ch. 7887, § 8 (purpose of Florida Farm Colony is segregation of feeble-minded); 1919 Ga. Laws 377, 379, No. 373, § 3 (segregation permitted “for his own protection or the protection of others”); 1918 Ky. Acts 156, ch. 54; *id.* at 171, § 30 (provision for segregation and custody of feeble-minded, epileptic, and insane persons); 1921 Neb. Laws 843, ch. 241, § 1 para. 7221 (object of state institution for feeble-minded is “to segregate them from society”); 1905 N.H. Laws 413, ch. 23, § 1 (provision for detention of feeble-minded females over age 21, if in best interest of community); 1917 N.H. Laws 645, ch. 141, § 1 (provision for detention of feeble-minded females over age 21, if in best interest of community); 1911 Pa. Laws 927, preamble & § 1 (commission established to investigate plan for segregation, care, and treatment of feeble-minded); 1913 Pa. Laws 494-95, No. 328, § 1 (state institution devoted to segregation and care of epileptics and feeble-minded); 1921 S.D. Sess. Laws 344, ch. 235, §§ 1-3 (state commission granted power to make regulations for care and segregation of feeble-minded); 1914 Va. Acts 242, ch. 147, § 1 (state board to develop scheme for training and segregation of feeble-minded); 1916 Va. Acts 662, ch. 388 (purpose of act to define feeble-mindedness and provide for care and segregation of feeble-minded in institutions); 1909 Wash. Laws 260, tit. II. ch. 6, § 2 (idiotic children to be segregated in suitable accommodations).

81. 42 U.S.C. § 12101(a)(7) (1994). Based on this statutory language, some courts and commentators have argued that the ADA overruled *Cleburne*. See *Martin v. Voinovich*, 840 F. Supp. 1175, 1209 (S.D. Ohio 1993) (finding that the ADA overruled *Cleburne*); Rains, *supra* note 53, at 201 (arguing that the ADA is intended to mandate heightened scrutiny); James B. Miller, Note and Comment, *The Disabled, the ADA, & Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 393 (1994) (arguing that the ADA overturned *Cleburne*). But see *Bartlett v. New York State Bd. of Law Exam’rs*, 970 F. Supp. 1094, 1134 (S.D.N.Y. 1997) (“[A]t the very least, *Boerne* tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection Clause.”), *vacated in part*, No. 97-9162, 1998 WL 611730 (2d Cir. Sept. 14, 1998).

commerce.”⁸² In addition, the ADA specifically abrogates the states’ sovereign immunity under the Eleventh Amendment.⁸³

The protections of the ADA apply to every “qualified individual with a disability.”⁸⁴ A disability is defined as a “physical or mental impairment^[85] that substantially limits^[86] one or more . . . major life activities of [an] individual,” including “functions such as caring for one’s self, performing

82. 42 U.S.C. § 12101(b)(4) (1994). As noted above, however, courts have begun to question whether Title II is a valid exercise of Congress’ Fourteenth Amendment power. *See supra* notes 13-14 and accompanying text; *Pierce v. King*, 918 F. Supp. 932, 940 (E.D.N.C. 1996) (“Unlike traditional anti-discrimination laws, the ADA demands entitlement in order to achieve its goals. This the Fourteenth Amendment cannot authorize.”).

83. The ADA includes a clause expressly abrogating states immunity. “A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.” 42 U.S.C. § 12202 (1994). As a result, courts have had no difficulty recognizing that Congress met the requirement of “unmistakable” intent to abrogate immunity in the ADA. *See Clark v. California*, 123 F.3d 1267, 1269-70 (9th Cir. 1997); *Autio v. AFSCME, Local 3139*, 968 F. Supp. 1366, 1368 (D. Minn. 1997), *aff’d*, 140 F. 3d 802 (8th Cir. 1998).

84. 42 U.S.C. § 12132 (1994).

The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. § 12131(2).

85. Physical and mental impairments means:

- (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;
- (B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 35.104 (1998).

86. Substantially limits means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (1998).

The regulations also list a number of factors to consider in determining whether a major life activity is substantially limited: “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” *Id.* § 1630.2(j)(2).

manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”⁸⁷ The definition of “disability” also requires that individuals have “a record of . . . an impairment”⁸⁸ or are “regarded as having . . . an impairment.”⁸⁹ In addition, the ADA protects nondisabled people who associate with disabled people.⁹⁰

The ADA is divided into several titles and governs a broad range of activities, including employment,⁹¹ government services,⁹² and public accommodations.⁹³ This Article focuses on Title II of the ADA, which prohibits discrimination and segregation by public entities.⁹⁴ “Public entity” is broadly defined to include “any State or local government” and “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁹⁵

Title II of the ADA expanded federal civil rights protection for the disabled by establishing that all state and local government⁹⁶ services be provided effectively, with necessary accommodations and aides, in integrated settings.⁹⁷

87. 28 C.F.R. § 35.104 (1998).

88. 42 U.S.C. § 12102(2)(B) (1994).

89. *Id.* § 12102(2)(C). Individuals may be “regarded as” disabled in one of three ways: (1) having an impairment that does not substantially limit a major life activity but is treated as if it did; (2) having an impairment that substantially limits a major life activity because of the attitudes of others; or (3) being treated as having an impairment where no such impairment exists. *See* 29 C.F.R. § 1630.2(l) (1998).

90. 42 U.S.C. § 12112(b)(4) (1994) (applying to employment); *see also* 28 C.F.R. § 35.130(g) (1998) (applying to public entities).

91. 42 U.S.C. §§ 12111-12117 (1994).

92. *Id.* §§ 12131-12165.

93. *Id.* §§ 12181-12189. Congress has also created a law to provide telecommunications services to individuals with speech or hearing impairments. 47 U.S.C. § 225 (1994).

94. 42 U.S.C. §§ 12131-12165. For a thorough discussion of Title II, *see* RUTH COLKER & BONNIE POITRAS TUCKER, *THE LAW OF DISABLING DISCRIMINATION*, ch. 6 (2d ed. 1998); Anne B. Thomas, *Beyond the Rehabilitation Act of 1973: Title II of the Americans with Disabilities Act*, 22 N.M. L. REV. 243 (1992).

95. 42 U.S.C. § 12131(1) (1994).

96. “[T]itle II applies to anything a public entity does. . . . [C]overage, however, is not limited to ‘Executive’ agencies but includes activities of the legislative and judicial branches of State and local governments.” 28 C.F.R. § 35, app. A at 446 (1998). Neither the statute nor its implementing regulations list specific state entities or agencies that are exempted from or included in Title II’s coverage. In contrast, Title I, dealing with employment, contains explicit exceptions to its broad applicability including the federal government, Indian tribes, and tax-exempt private clubs. 42 U.S.C. § 12111(5)(B) (1994). Likewise, Title III, dealing with accommodations, lists twelve categories of covered private entities. *Id.* § 12181(7)(A)-(L).

97. 42 U.S.C. §§ 12131-34 (1994). The relevant language in Title II states: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (1994).

In addition to prohibiting intentional discrimination, Title II requires public entities to operate their programs and services in a manner readily accessible to qualified individuals with a disability.⁹⁸ Public entities must, like the private sector, provide reasonable accommodations to disabled individuals.⁹⁹ Rather than using the generic term “reasonable accommodation,” like Title I of the ADA, Title II expressly mandates the types of accommodations that must be provided. These include the reasonable modifications of rules, policies or practices, the removal of architectural, communication or transportation barriers, and the provision of auxiliary aids.¹⁰⁰ When faced with a claim of discrimination or failure to accommodate, state and local governments have available the same defenses as private entities.¹⁰¹

Title II states that the remedies available in any action against a state are the same as those available in an action under the ADA against any other entity.¹⁰²

98. See 28 C.F.R. § 35.150(a) (1998). Title II uses the phrase “qualified individual with a disability” to refer to those who are covered by its provisions. 42 U.S.C. § 12131(2) (1994). The term “qualified individual with a disability” is defined as:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id.

99. See 29 C.F.R. § 1630.9(a) (1998).

100. See 42 U.S.C. § 12131(2) (1994).

101. Title II imposes its conditions on all public entities, regardless of size. Like private entities, however, public entities can be excused from some of the requirements if they can show that compliance would create an undue financial and administrative burden, see 28 C.F.R. § 35.150(a)(3) (1998) (applying to the modification of existing facilities); *id.* § 35.164 (applying to the procurement of communications devices); 49 C.F.R. § 37.151 (1998) (applying to paratransit services), cause a fundamental alteration in the service, see 28 C.F.R. § 35.150(a)(3) (1998) (applying to the modification of existing facilities); *id.* § 35.164 (applying to the procurement of communications devices), or destroy the historic significance of a building, see *id.* § 35.150(a)(2) (qualifying the requirement that public services be readily accessible to disabled individuals).

In the employment context, public entities may avoid the requirements of Title II by demonstrating that providing an accommodation would impose an undue hardship. See 29 C.F.R. § 1630.15(d) (1998). “Undue hardship” means “significant difficulty or expense.” See *id.* § 1630.2(p)(1). To determine whether an accommodation imposes significant expense, courts must consider the cost of the accommodation and the employer’s financial resources. See *id.* § 1630.15(p)(2). In addition, accommodations must be reasonable. See *Vande Zande v. Wisconsin Dep’t of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995) (holding that to present a prima facie case of discrimination under the ADA for failure to provide an accommodation, an employee “must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs”). Also, while employers may have to consider the disabled individual’s suggestions, see 29 C.F.R. § 1630.2(o)(3) (1998), the final choice is left to the employer. See *id.* § 1630 app. at 363.

102. “In any action against a State for a violation of the requirements of this chapter, remedies

Under Title II, plaintiffs with disabilities have successfully challenged laws and policies traditionally considered within the states' police power, including marriage regulations,¹⁰³ quarantine rules,¹⁰⁴ social service policies and placements,¹⁰⁵ zoning ordinances,¹⁰⁶ road construction and building modifications,¹⁰⁷ jury selection criteria,¹⁰⁸ and state bar licensing procedures.¹⁰⁹

(including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State." 42 U.S.C. § 12202 (1994); *see also* Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13, 63 & n.325 (1992) (describing Title II's enforcement scheme). Although courts have been willing to award various accommodations to disabled plaintiffs under Title II, *see* Bartlett v. New York State Bd. of Law Exam'rs, No. 97-9162, 1998 WL 611730 (2d. Cir. Sept. 14, 1998), the courts have not yet settled on whether and when damage awards should be available to plaintiffs, particularly in cases where the plaintiff has failed to show intentional discrimination. For a thorough discussion about the debate over the various types of relief available under Title II, *see* COLKER & TUCKER, *supra* note 94, at 547 (discussing the availability of compensatory and punitive damages under Title II).

103. *See, e.g.*, T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993) (invalidating state law that voided marriage by persons with AIDS).

104. *See* Crowder v. Kitagawa, 81 F.3d 1480, 1486 (9th Cir. 1996) (holding that plaintiffs' suit stated a claim that Hawaii's quarantine law discriminated against blind individuals and remanding for discussion of whether the proposed modifications to the law were reasonable).

105. *See, e.g.*, Helen L. v. DiDario, 46 F.3d 325, 336-39 (3d Cir. 1995) (holding that Title II requires state social service agency to implement reasonably integrated services for clients with disabilities); Weaver v. New Mexico Human Servs. Dep't, 945 P.2d 70 (N. Mex. 1997) (holding that a New Mexico Human Services regulation which imposed a 12-month maximum period of eligibility for disabled adults receiving benefits from the general assistance program violated Title II of the ADA).

106. *See, e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 738 (1995) (holding that federal statute prohibiting discrimination in housing based on disability should be interpreted to allow challenge to city zoning provision that limited the number of unrelated occupants allowed in a dwelling because the provision failed to accommodate reasonably a group home for recovering addicts).

107. *See* Kinney v. Yerusalim, 9 F.3d 1067, 1075 (3d Cir. 1993) (holding that Title II required curb cuts installed when city undertook to make certain street paving and resurfacing repairs).

108. *See, e.g.*, Galloway v. Superior Court, 816 F. Supp. 12, 19-20 (D.D.C. 1993) (holding that blanket exclusion of blind people from jury pool violates the ADA); People v. Caldwell, 603 N.Y.S.2d 713, 716 (N.Y. Crim. Ct. 1993) (holding that court had obligation under ADA to reasonably accommodate potential juror's visual impairment). The courts have also recognized that courthouses must be accessible to individuals with disabilities. *See* Kroll v. Saint Charles County, 766 F. Supp. 744, 752-53 (E.D. Mo. 1991).

109. *See, e.g.*, Clark v. Virginia Bd. of Bar Exam'rs, 880 F. Supp. 430 (E.D. Va. 1995) (holding that state bar application asking questions concerning mental, emotional or nervous disorders are impermissible under Title II); Ellen S. v. Florida Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1494-95 (S.D. Fla. 1994) (holding that Tenth Amendment posed no independent bar to

III. DEBATING THE ADA'S ABROGATION OF STATE SOVEREIGN IMMUNITY

After the *Seminole Tribe* and *City of Boerne* decisions, the Eleventh Amendment and Fourteenth Amendment questions in ADA cases thus are (1) whether Congress abrogated the Eleventh Amendment immunity with sufficient clarity; and (2) whether the ADA is a valid exercise of Congress' power to enforce the Fourteenth Amendment.¹¹⁰

Section 502 of the ADA expressly abrogates Eleventh Amendment protection for violations of the ADA and makes both legal and equitable remedies available in federal court against a state "to the same extent as such remedies are available for such a violation and an action against any public or private entities other than the state."¹¹¹ Such language satisfies the first part of the *Seminole Tribe* test in ADA cases.¹¹²

application of ADA to state regulation of attorneys); *cf.* *Medical Soc'y of N.J. v. Jacobs*, No. Civ. A. 93-3670 (WGB), 1993 WL 413016, at *7-8 (D.N.J. Oct. 5, 1993) (holding that State Board of Medical Examiners' investigation of mental health history of medical license applicants violated Title II by placing additional burdens on applicants with disabilities). *See also* Catherine C. Cobb, *Challenging a State Bar's Mental Health Inquiries Under the ADA*, 32 HOUS. L. REV. 1383 (1996).

110. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

111. 42 U.S.C. § 12202 (1994) ("A State shall not be immune under the eleventh amendment . . ."). *See also* *Autio v. AFSCME*, Local 3139, 140 F.3d 802, 804 (8th Cir. 1998) (Congress clearly abrogated states' Eleventh Amendment immunity by enacting ADA); *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998) (holding that the ADA includes a clear statement of intent to abrogate Eleventh Amendment immunity); *Clark v. California*, 123 F.3d 1267, 1269 (9th Cir. 1997) (Congress unequivocally expressed its intent to abrogate the state's immunity under both ADA and Rehabilitation Act), *cert. denied*, 118 S. Ct. 2340 (1998); *Nihiser v. Ohio Env'tl. Protection Agency*, 979 F. Supp. 1168 (S.D. Ohio 1997) (Congress plainly indicated intent to abrogate states' immunity under Eleventh Amendment to suit under ADA and Rehabilitation Act). For a discussion of the clear statement rule as applied to the ADA and state prisons, see Michael P. Lee, *How Clear is "Clear?": A Lenient Interpretation of the Gregory v. Ashcroft Clear Statement Rule*, 65 U. CHI. L. REV. 255 (1998); Laura E. Walvoord, *A Critique of Torcasio v. Murray and the Use of the Clear Statement Rule to Interpret the Americans with Disabilities Act*, 80 MINN. L. REV. 1183 (1996). It is also important to note that the statute provides that states are not immune from ADA claims brought in "Federal or State court." 42 U.S.C. § 12202 (1994). *See* *Weaver v. New Mexico Human Servs. Dep't*, 945 P.2d 70 (N. Mex. 1997). Thus, even if an individual cannot use the ADA in federal courts, state courts must still hear the claim.

112. In *Pennsylvania Department of Corrections v. Yeskey*, 118 S. Ct. 1952 (1998), a unanimous Supreme Court held that the plain language of Title II covers state prisons and prisoners. The Court further held that the term "qualified individual with a disability" is *not* ambiguous when applied to state prisoners. *Id.* at 1955. The Court determined that the ADA language does not require voluntary participation in the programs or services of a public entity to be protected under Title II. Rather, the Court found that Congress intended Title II to govern all state entities that provide any type of services, whether voluntary or not, to members of the population. *Id.*

Under the *City of Boerne* decision, the second part of the *Seminole Tribe* analysis becomes less certain.¹¹³ It is unclear whether the ADA is a valid exercise of congressional authority under the Fourteenth Amendment.¹¹⁴ Congress enacted the ADA and declared that disabled individuals were a "discrete and insular minority;" the Supreme Court, however, did not reach the same conclusion in its earlier decision concerning discrimination against disabled individuals.

In *City of Cleburne v. Cleburne Living Center, Inc.*,¹¹⁵ the Supreme Court addressed whether mental disability is a suspect or quasi-suspect classification.¹¹⁶ *Cleburne* involved a city zoning ordinance that required a special use permit to operate a group home for mentally retarded persons.¹¹⁷ The plaintiffs challenged the city's denial of their request for a permit on equal protection grounds.¹¹⁸ Although the court held that mental disability is not a suspect classification,¹¹⁹ it found the denial of the permit violated the Fourteenth Amendment using a rational basis standard.¹²⁰ In *Cleburne*,¹²¹ the Court observed that no "continuing antipathy or prejudice" exists towards persons with mental disabilities, thereby obviating the need for a heightened level of scrutiny.¹²² In its analysis, the Court mentioned a series of groups that it also apparently believed did not trigger

113. For a discussion of the continuing validity of the ADA after *City of Boerne*, see Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term*, 19 CARDOZO L. REV. 2259, 2289-2302 (1998); Elizabeth Welter, Note, *The ADA's Abrogation of Eleventh Amendment State Immunity as a Valid Exercise of Congress' Power to Enforce the Fourteenth Amendment*, 82 MINN. L. REV. 1139 (1998); Note, *Section Five and the Protection of Nonsuspect Classes After City of Boerne v. Flores*, 111 HARV. L. REV. 1542 (1998).

114. See *supra* notes 13-15 and accompanying text. See generally Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom From State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633 (1998); Brent R. Hatcher, Jr., Casenote, *City of Boerne v. Flores: Defining the Limits of Congress' Fourteenth Amendment Enforcement Clause Power*, 49 MERCER L. REV. 565 (1998).

115. 473 U.S. 432 (1985).

116. *Id.* at 435.

117. *Id.* at 436.

118. *Id.* at 437.

119. *Id.* at 442.

120. *Id.* at 435. In his opinion, concurring in part and dissenting in part, Justice Marshall argued that the majority reached this result using a higher level of scrutiny than it acknowledged. *Id.* at 456 (Marshall, J., concurring in part and dissenting in part). Later commentators have agreed with Justice Marshall's analysis. See *TRIBE, supra* note 41, § 16-3, at 1444; Galye Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793-96 (1987) (discussing the heightened level of scrutiny in *Cleburne*).

121. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

122. *Id.* at 443.

heightened scrutiny, including the physically disabled.¹²³ As a result, courts and commentators have understood *Cleburne* to establish that disability in general is not a suspect classification.¹²⁴ The fact that the disabled appear to be a non-suspect class under current Supreme Court precedent limits Congress' ability to legislate on their behalf. Based on *City of Boerne*, in order to protect a non-suspect class, Congress must find facts that demonstrate the existence of invidious discrimination in a law which would otherwise withstand rational basis scrutiny.¹²⁵

Because *City of Boerne's* narrow interpretation of Congress' Section 5 authority leaves open the possibility that the ADA is not a valid exercise of Congress' power, and thus fails to abrogate state immunity, states have been quick to maintain that the ADA should not be applicable to them.¹²⁶ Based on *City of Boerne*, states have maintained that Congress' attempt to abrogate state immunity fails because the ADA applies heightened scrutiny to a non-suspect class and effectively punishes "rational" discrimination by public entities by requiring reasonable accommodations for the disabled.¹²⁷ Several courts have

123. *Id.* at 445-46 (rejecting eligibility for heightened scrutiny for groups such as "the aging, the disabled, the mentally ill, and the infirm").

124. *See Hansen v. Rimel*, 104 F.3d 189, 190 n.3 (8th Cir. 1997) ("Although protected by statutory enactments such as the [ADA], the disabled do not constitute a 'suspect class' for purposes of equal protection analysis."); *Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 824-27 (2d Cir. 1996) (applying rational basis standard to claims of disabled individuals), *cert. denied*, 117 S. Ct. 1843 (1997). *See also Rains, supra* note 52, at 199 (asserting that *Cleburne* "managed to weaken future equal protection claims asserted by, not only mentally retarded persons, but other individuals with disabilities").

125. *City of Boerne v. Flores*, 117 St. Ct. 2157, 2169-71 (1997).

126. *See Autio v. AFSCME, Local 3139*, 140 F.3d 802, 805 (8th Cir. 1998) (describing the state's argument as emphasizing that disability is subject to the rational basis test and implying that the ADA illegitimately embodies a higher level of scrutiny than rational basis); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997) (rejecting state's argument that Congress' power must be limited to the protection of those classes found by the Court to deserve heightened scrutiny under the Constitution), *cert. denied*, 118 S. Ct. 2340 (1998). *But see Garrett v. Board of Trustees of the Univ. of Ala.*, 989 F. Supp. 1409, 1409-10 (N.D. Ala. 1998) (arguing that *City of Boerne* apparently "was not available to, was ignored by, or was misunderstood by those courts that have ruled in favor of applying the ADA . . . to states").

127. *See Garrett*, 989 F. Supp. at 1410 (noting that Congress cannot require a state to grant preferential treatment under the ADA to its employees simply by purporting to invoke Section 5); *Brown v. North Carolina Div. of Motor Vehicles*, 987 F. Supp. 451, 460 (E.D.N.C. 1997) (finding that Congress improperly invoked Fourteenth Amendment to facilitate the ADA's putative abrogation of the sovereign immunity of the states; therefore Eleventh Amendment is a properly asserted defense for state in ADA action); *Nihiser v. Ohio Envtl. Protection Agency*, 979 F. Supp. 1168, 1176 (S.D. Ohio 1997) (finding that insofar as accommodation is defined under 42 U.S.C. § 12111(9) (1994), ADA and Rehabilitation Act accommodation provisions are not a valid exercise of Congress' enforcement power under Fourteenth Amendment).

agreed with these arguments and have refused to abrogate sovereign immunity.¹²⁸

For example, in *Brown v. North Carolina Division of Motor Vehicles*,¹²⁹ the court decided that the ADA is a substantive rather than remedial exercise of Section 5.¹³⁰ Second the court focused on the ADA's reasonable accommodation requirement and determined that this rendered the ADA an improper exercise of Section 5¹³¹ because "the ADA does not remediate invidious, arbitrary, or irrationally made classifications."¹³²

Other courts have taken a different approach to the abrogation issue, upholding the ADA's abrogation of Eleventh Amendment immunity as a valid exercise of its Section 5 power.¹³³ In *Autio v. AFSCME, Local 3139*,¹³⁴ the Eighth Circuit upheld jurisdiction under the ADA.¹³⁵ The court applied both the *Morgan* test,¹³⁶ and *City of Boerne's* congruence and proportionality analysis,

128. See *Garrett*, 989 F. Supp. at 1410 ("Congress cannot stretch Section 5 and the Equal Protection Clause of the Fourteenth Amendment to force a state to provide allegedly equal treatment by guaranteeing special treatment or 'accommodation' for disabled persons."); *Brown*, 987 F. Supp. at 458 (stating that "[t]he ADA . . . single[s] out the disabled for special, advantageous treatment"); *Nihiser*, 979 F. Supp. at 1174 (asserting that "[t]he accommodation provisions will place a serious financial burden upon the states").

129. 987 F. Supp. 451 (E.D.N.C. 1997).

130. *Id.* at 458 (noting that Congress cannot alter the Supreme Court's classification of disabled individuals as a non-suspect class).

131. *Id.* The court said "the concept of entitlements has little to do with promoting the 'equal protection of the laws.'" *Id.* See also *Nihiser*, 979 F. Supp. at 1176 (holding that the ADA does not abrogate sovereign immunity because the ADA's accommodation provisions amount to congressionally "created substantive rights").

132. *Brown*, 987 F. Supp. at 458.

133. See *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998) (holding that Congress effectively abrogated states' Eleventh Amendment immunity from suits under the ADA), *vacated in part*, 118 S. Ct. 2339 (1998); *Amos v. Maryland Dep't of Pub. Safety and Correctional Servs.*, 126 F.3d 589, 604 (4th Cir. 1997) (holding Congress has expressly abrogated Eleventh Amendment immunity of states under ADA); *Armstrong v. Wilson*, 124 F.3d 1019, 1026 (9th Cir. 1997) (holding that exception to Eleventh Amendment immunity set forth in *Ex Parte Young* applies to allow ADA action against named individuals in their official capacities), *cert. denied*, 118 S. Ct. 2340 (1998). One post-*City of Boerne* decision concerning whether the ADA effectively abrogated state immunity, upheld the ADA's validity against the state without ever applying the new congruence and proportionality standard. See *Wallin v. Minnesota Dep't of Corrections*, 974 F. Supp. 1234 (D. Minn. 1997).

134. 140 F.3d 802 (8th Cir. 1998).

135. *Id.* at 803.

136. As mentioned above, in *Morgan*, the Court applied a three-part test: "We . . . proceed to the consideration whether [section] 4(e) is 'appropriate legislation' to enforce the Equal Protection clause, . . . whether it is 'plainly adopted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

and found that the ADA constituted a valid exercise of Section 5.¹³⁷ Deferring to Congress' finding that the disabled are a "discrete and insular minority"¹³⁸ that has been historically isolated and lacks legal redress for its treatment, the court found the remedial requirement of *City of Boerne* satisfied.¹³⁹ The court further distinguished the ADA from RFRA on the basis that the purpose and structure of the ADA indicate that its primary goal is to eradicate the effects of intentional discrimination.¹⁴⁰ The *Autio* court then rejected the state's argument that Congress cannot act under Section 5 on behalf of non-suspect classes. It observed that many laws abrogating Eleventh Amendment immunity have been upheld as constitutional where the protected rights were not grounded in a quasi-suspect or suspect classification.¹⁴¹

Likewise, in *Crawford v. Indiana Department of Corrections*,¹⁴² the Seventh Circuit, in an opinion written by Judge Posner, held that the Eleventh Amendment does not block application of the ADA to state entities.¹⁴³

Like other anti-discrimination statutes, the Americans with Disabilities Act is an exercise of Congress' power under section 5 of the Fourteenth Amendment (as well as under the commerce clause, which is not excepted from the Eleventh Amendment) to enact legislation designed to enforce and bolster the substantive provisions of the amendment, in this case the equal protection clause. The Eleventh Amendment does not insulate the states from suits in federal court to enforce federal statutes

137. *Autio*, 140 F.3d at 804-06.

138. 42 U.S.C. § 12101(a)(7) (1994).

139. *Autio*, 140 F.3d at 805 n.4. Likewise, other courts have also given the ADA's congressional findings great deference when upholding Congress' use of the Fourteenth Amendment enforcement power as remedial in enacting the ADA. See *Coolbaugh v. Louisiana*, 136 F.3d 430 (5th Cir. 1998).

140. *Autio*, 140 F.3d at 804-05. Although Congress defined "discrimination" to include "the discriminatory effects of architectural, transportation, and communication barriers," Congress' definition of discrimination also includes more traditional examples of purposeful conduct such as "outright intentional exclusion, . . . overprotective rules and policies, . . . [and] segregation." 42 U.S.C. § 12101(a)(5) (1994).

141. *Autio*, 140 F.3d at 805. See also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (stating that method to correct invidious discrimination is not through creation of a new suspect class); *Martin v. Kansas*, 978 F. Supp. 992, 995 (D. Kan. 1997) ("Congress, in enacting the ADA, has provided the direction absent in *City of Cleburne*, thus making distinctions between the judicial standards of review meaningless."). The *Martin* court cited language from *Cleburne* that suggested that the judiciary has created a standard for reviewing disability-based classifications only in light of Congress' failure to do so through Section 5. *Id.* The *Martin* Court appeared to be arguing that now that Congress had made findings concerning the constitutional treatment the disabled had received by public entities, the courts were free to reconsider their earlier approach and adopt Congress' standard. See *id.*

142. 115 F.3d 481 (7th Cir. 1997).

143. *Id.* at 487.

enacted under the authority of the Fourteenth Amendment. . . . Invidious discrimination by government agencies . . . violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against such discrimination, Congress was acting well within its powers under section 5.¹⁴⁴

The lower courts that considered *City of Boerne* are divided regarding how much deference they should give Congress' finding that a law constitutes arbitrary or invidious discrimination in violation of the Fourteenth Amendment, and whether Congress can abrogate sovereign immunity to remedy the identified violation. The courts that have relied on Congress' findings concerning the pervasive discrimination experienced by the disabled by not only private entities but public, have upheld the ADA as a valid exercise of Congress' Fourteenth Amendment authority. It remains unclear whether the Supreme Court will uphold such decisions.

In general, discrimination experienced by disabled individuals has often been found to be non-intentional and thus not based on invidious discrimination.¹⁴⁵ Public entities will be able to show that the rationale for failing to provide reasonable accommodations to the disabled resulted from economic realities, not hatred.¹⁴⁶ Such disparate impact discrimination may no longer be within Congress' power to remedy after *City of Boerne*.¹⁴⁷ Thus, even though discrimination against the disabled may be unfair and in need of a global federal remedy, Congress may not be able to provide any relief against state discrimination.

Congress is in the unique position to examine what is occurring in this country at a national level. Only Congress can identify systematic failures across the states and can act to address these problems by prohibiting discrimination against minorities, including non-suspect classes, by private and public entities. The enactment of the Fourteenth Amendment and the other Civil War Amendments¹⁴⁸ provided the federal government with greater authority over the states so that individuals would receive protection from various forms of discrimination.¹⁴⁹ Arguably, the Fourteenth Amendment does provide Congress

144. *Id.*

145. *See Alexander v. Choate*, 469 U.S. 287 (1985) (discussing the Rehabilitation Act and finding that the discrimination against the disabled resulted from thoughtlessness and indifference).

146. *See Concerned Parents to Save Dehrer Park Ctr. v. City of West Palm Beach*, 846 F. Supp. 986, 992 (Fla. 1994) (holding that although the city can make an economic determination that the disabled do not require any level of benefits, the ADA "does require that any benefits provided to non-disabled persons must be equally made available for disabled persons").

147. *See Washington v. Davis*, 426 U.S. 229, 240-41 (1976) (holding that the Equal Protection Clause reaches only intentional discrimination).

148. U.S. CONST. amends. XIII-XV.

149. *See Nowak, supra* note 41, at 1209 ("If the civil War did anything, it changed the structure of our nation from one where political and economic power resided in certain localities

with the ability to establish a floor of protection for all citizens against irrational discrimination.¹⁵⁰ As a result of the recent federalism decisions, however, Congress' authority to deal with irrational discrimination against non-suspect classes has been put in doubt. Thus, the practical consequences of the new federalism undermine Professor Yoo's argument that this new federalism contributes to liberty.¹⁵¹

Uncertainty now exists as to whether lower courts, and even the Supreme Court, will uphold laws that protect non-suspect classes, such as the disabled, as valid against state governments.¹⁵² Nothing in the Supreme Court's recent

to one truly unified nation.”); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975) (stating that the history of the Eleventh Amendment “[e]stablish[es] the principle that Congress should be free to determine the extent of federal court jurisdiction over state governments, and this principle was reaffirmed by the ratification of the Fourteenth amendment.”). Even the Supreme Court acknowledged that the Fourteenth Amendment changed the balance of power between the state and federal government. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2165 (1997) (observing that the Fourteenth amendment “‘limited but did not oust the jurisdiction of the State[s]’”) (quoting CONG. GLOBE, 42d Cong., 1st Sess., at App.151 (1971) (statement of Rep. Garfield)).

150. See Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 171 (1997) (arguing that under Section 5, Congress should be viewed “as having some degree of authority to determine for itself what the provisions of the Fourteenth Amendment mean, and to pass enforcement legislation pursuant to those determinations”). Permitting Congress to pass laws that establish a minimum level of protection does not undermine state autonomy and the ability of states to experiment and protect their citizens' liberty interests. States are still free to experiment above the level that congress has legislated. For instance, the ADA provides that states may not discriminate against the disabled and must make reasonable accommodations. Although states may no longer discriminate against the disabled, they may provide more protections than the federal law requires. Thus, states continue to serve as laboratories and protectors of liberty interests.

151. See Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009 (1997), stating:

Federalism is a bit like abdominal surgery. It can save the political life of a nation under certain circumstances, but it is not benign and should not be resorted to without a reason. It can be divisive, exaggerating political differences that might otherwise have dissipated over time, and exacerbating conflicts that might otherwise have been resolved. Moreover, because it grants political sub-units definitive rights against the central government, it means that some residents of those sub-unities are likely to be treated in a way that the majority of the nation regards as wrong, and even immoral.

152. Jesse Choper argues that:

The ultimate question, not really addressed in *City of Boerne*, is whether the Court can be persuaded that “[m]any of the laws affected by the . . . [ADA] have a significant likelihood of being unconstitutional” and, if so, whether the ADA's encompassing activities such as wheelchair access to prison recreational facilities

federalism cases prevents lower courts from finding that states are immune from the ADA in federal court. Indeed, the courts that have held that Congress lacks the authority to abrogate state immunity under the ADA appear to be applying the new federalism cases in a principled way.¹⁵³ However, these lower court holdings are disturbing in that they are inconsistent with Congress' purpose in enacting legislation to remedy disability discrimination. They also do not seem consistent with a version of federalism that provides greater personal liberty to all citizens.

CONCLUSION

The Court's new federalism does provide greater protection for state autonomy concerns. Although arguably the Supreme Court has an important role to play in these concerns, its federalism theory has undermined, not enhanced, individual liberties. Given the current Supreme Court jurisprudence, the ADA gives an individual access to the federal courts to challenge an exclusion from employment at Burger King and IBM, but not to challenge discrimination by state or local government entities. Surely this is not what Congress had in mind when it enacted the ADA because it found that state governments caused much of the discrimination against the disabled. The current new federalism permits lower courts to find state governments immune in federal suits against them under the ADA for their past or future misdeeds.

Professor Yoo uses historical arguments from the framers' era to demonstrate his theory that a strong form of federalism is mandated. It is easy to overlook the real world implications of that theory. Notwithstanding the cogent historical and theoretical arguments set forth by Professor Yoo, recent developments in disability law weaken the argument that the Court views increasing personal liberty for citizens as the basis for its new federalism.

and a public school's policy regarding students with HIV satisfies the "congruence and proportionality" requirement in *City of Boerne*.

Choper, *supra* note 113, at 2301-02 (quoting *City of Boerne*, 117 S. Ct. at 2170).

153. See generally, Note, *supra* note 113, at 1554 (noting that the courts that have upheld abrogation under the ADA and the ADEA do not appear to do so on a principled, basis as they appear to be relying on the ratchet theory to justify their holdings).

FEDERAL POWER TO COMMANDEER STATE COURTS: IMPLICATIONS FOR THE THEORY OF JUDICIAL FEDERALISM

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INTRODUCTION

Whatever one's views are of the proposed global tobacco settlement on the merits, at least from the perspective of a federal jurisdiction scholar it is truly disappointing that the settlement appears to have collapsed. It would have been fascinating to see how Congress finally resolved the complex problems inherent in having the federal government effectively ordering the state courts not to adjudicate state law tort claims. It would have been even more fascinating to see whether or not the Supreme Court ultimately found Congress' solution unconstitutional.

Unlike the means necessary to implement the settlement, the competing interests of the parties to the settlement are relatively clear. Congress, presumably recognizing that it cannot realistically hope to ban the sale of cigarettes, sought methods both of assuring that tobacco manufacturers compensate those thought to have suffered as a result of smoking and to deter others from taking up the habit in the future. In contrast, the tobacco manufacturers sought a method to place a reasonable ceiling on their potential liability. Thus, in exchange for an agreement either to reduce or cease advertising and to provide substantial compensatory funds, the tobacco industry expected strict outer limits on the amount of damages they could be forced to pay and severe restrictions on the use of multi-party litigation devices, such as class action lawsuits. The problem, however, is that most, if not all, of the product liability litigation against tobacco manufacturers arises under state tort law, and much of it is brought in state court. In order to satisfy the tobacco industry's expectations Congress would somehow have to impose limits on both the nature and substance of state law litigation in state court. While the problems of constitutional federalism to which this task gives rise may not be insurmountable, their solution requires a sophisticated understanding of the issues of textual construction, historical inquiry and political theory that pervade analysis of the federal government's power to commandeer the state judiciaries in order to facilitate the attainment of federal objectives.

The political timeliness of the constitutional issues raised by the tobacco settlement render this an appropriate point at which to reexamine the theoretical rationale for constitutional limitations on and doctrinal implications of the federal government's power to commandeer state judiciaries. Since the Supreme

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Court's decision in *Testa v. Katt*,¹ Congress' power to require state courts to adjudicate issues of federal law and enforce federal claims has been well established. Recently, in *Printz v. United States*,² the Court unequivocally reaffirmed the existence of that congressional power, while simultaneously finding unconstitutional a congressional attempt to commandeer state executive officers.³ A fact that has often gone unnoticed, however, is that the Court in *Testa* never actually grounded such a congressional power within the terms of a specific constitutional grant of authority. Rather, it merely assumed the existence of such a power, and proceeded to focus exclusively on the nature of a state court's constitutional obligation once Congress chooses to exercise its unexplained power.⁴

While in *Printz* the Court did purport to find a constitutional grounding that simultaneously rationalized the existence of a federal power to commandeer state judicial officers and rejected a federal power to commandeer state executive officers,⁵ casual analysis demonstrates the incorrectness of the Court's rationale. The Court in *Printz* sought to split the proverbial baby, by grounding the congressional power to commandeer state courts in the "State Judges Clause" of the Supremacy Clause.⁶ Because by its terms the provision refers solely to the obligations of state judges to enforce federal law, the Court's reliance on the Clause appears simultaneously to rationalize both of the Court's conclusions in *Printz*. Closer examination, however, reveals that the *Printz* Court misconstrued the State Judges Clause: Both by its individual terms and its broader textual context, the State Judges Clause concerns solely the implementation of an independently authorized congressional power to commandeer. It does not itself provide a constitutional source of congressional power to engage in such commandeering.

We should emphasize that we in no way intend to question the constitutional validity of the congressional power to impress the state courts into the federal judicial army. However, to date the Supreme Court has failed to recognize the proper textual basis for the authorization of such a power: A synthesis of Congress' enumerated powers pursuant to Article I and its power under that same provision to enact laws that are necessary and proper to the exercise of such

1. 330 U.S. 386 (1947).

2. 117 S. Ct. 2365 (1997).

3. *Id.* at 2384.

4. *Testa*, 330 U.S. at 814.

5. *Printz*, 117 S. Ct. at 2384.

6. U.S. CONST. art. VI, cl.2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

powers.⁷ Recognition of the proper constitutional rationale for the judicial commandeering power inexorably leads to the conclusion that the Court in *Printz* was totally incorrect in drawing a distinction between the federal power to commandeer state courts on the one hand and state executive officers on the other; neither on grounds of constitutional text nor federalism theory may such a distinction be properly drawn. Thus, if Congress possesses constitutional authority to commandeer state judicial officers, it necessarily follows that Congress possesses constitutional authority to commandeer state executive officers, as well.

Although the Court is no doubt correct in its recognition of a federal power to commandeer state judiciaries in order to facilitate the implementation and enforcement of federal law, it has erred in explaining the constitutional and theoretical sources for such power. The Court has failed to recognize the proper doctrinal and conceptual implications that derive from the recognition of the commandeering power. The historical and philosophical factors which dictate the federal power to commandeer state courts lead to the conclusion that the enormous federal deference to state judiciaries that the Supreme Court currently requires from the lower federal courts⁸ actually stands the governing theory of judicial federalism on its head.

It is true, as the Supreme Court has assumed in fashioning its theory of deference to state judiciaries,⁹ that state courts are fully competent to adjudicate and enforce federal law. However, examination of the history of the federal power to commandeer state judiciaries demonstrates that this state court authority flows, not out of an assumption of parity or equality among state and federal courts as expositors and enforcers of federal law,¹⁰ but rather from recognition of the fact that on occasion, state court enforcement of federal law may be necessary in order to preserve federal supremacy or to facilitate attainment of substantive congressional goals. Thus, the fact that state courts are both empowered and obligated to adjudicate and enforce federal law does not manifest historical concern, theoretical concern or respect for the status or abilities of state judiciaries, but rather manifests the unambiguously subordinate position that state judiciaries hold within the federal system. Therefore, it makes little sense to rely on the inherent authority of state judiciaries to adjudicate federal law as a basis for federal governmental deference to state judicial authority. State courts adjudicate federal law because for them to do so proves convenient for and

7. U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.").

8. See, e.g., *Younger v. Harris*, 401 U.S. 37, 45 (1971) (requiring that federal courts not enjoin state court actions except "under extraordinary circumstances, where the danger of irreparable loss is both great and immediate").

9. See *Steffel v. Thompson*, 415 U.S. 452 (1972).

10. See Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Michael E. Solomine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983).

beneficial to the federal government. When allowing state courts to adjudicate issues of federal law proves inconvenient or unbeneficial to federal interests, the fact that state courts possess the potential power to expound and enforce federal law, standing alone,¹¹ provides absolutely no justification for allowing state adjudication.

Recognition of the proper historical and conceptual framework in which the commandeering power has developed also has important implications for determining the proper procedures to be employed in the course of state court adjudication of federal claims. While the Supreme Court has uniformly upheld congressional power to require state court adjudication of federal claims, it has paid surprisingly little attention to the issue of the extent of a state court's obligation to employ federal procedures in the conduct of those adjudications.¹² Yet in other contexts, the Supreme Court has explicitly acknowledged the significant extent to which the use of procedure may affect the scope and nature of the substantive rights and interests that provide the subject for adjudication.¹³ Given the theoretical and practical primacy of the federal level of government that is implicit in recognition of the judicial commandeering power, it would seem reasonable for the Court to provide considerably more attention than it has to date to determine the extent to which the state obligation to enforce substantive federal claims should simultaneously dictate an obligation to employ preexisting federal procedures in the course of those adjudications. Devoting proper attention to this question would lead to the conclusion that state courts should be required to employ federal procedures in the adjudication of substantive federal claims considerably more often than currently appears to be the case.

This Article seeks to obtain a full understanding of both the proper constitutional rationale for the federal power to commandeer state courts and the implications of that power for the modern doctrine and theory of judicial federalism. In Part I, this Article discusses the modern doctrinal development of the federal power to commandeer state courts, from its initial exposition in *Testa*¹⁴ through its most recent characterization in *Printz*.¹⁵ In critiquing the logic, if not the conclusion, of this doctrinal evolution, we explore the historical, textual and political rationales for the commandeering power.

In Part II, this Article focuses on the theoretical and doctrinal implications that should be drawn from recognition of the proper historical and philosophical grounding of the commandeering power. Specifically, it explores the implications of the role of state courts within the federal system that derive from

11. On occasion, there may exist other bases on which to justify federal deference to state courts, such as a concern about unduly disrupting state court adjudication of its state law caseload. It is conceivable that on occasion such concerns could independently justify federal deference to state courts.

12. See, e.g., *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952).

13. See, e.g., *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

14. *Testa v. Katt*, 330 U.S. 386 (1947).

15. *Printz v. United States*, 117 S. Ct. 2365 (1997).

the commandeering power for modern Supreme Court doctrines dictating far-reaching deference to state courts. Part II also considers the proper implications of the commandeering power for the role of federal procedures in a state court's adjudication of a federal claim. Ultimately, we conclude that while the Court is no doubt correct in recognizing a federal commandeering power, it is totally incorrect in its assessment of the proper constitutional grounding of such a power, as well as the theoretical and doctrinal implications which should logically flow from such recognition.

I. FEDERAL COMMANDEERING POWER: DOCTRINE, HISTORY, AND THEORY

A. *Testa v. Katt* and Recognition of the Commandeering Power

The case in which the state court commandeering power is generally thought to have been conceived is *Testa v. Katt*.¹⁶ In *Testa*, the plaintiff sued in Rhode Island state court under the Emergency Price Control Act of 1942 (the "Act")¹⁷ to recover treble damages from a defendant who had sold plaintiff a car at a cost above an imposed price ceiling. The State Supreme Court refused to enforce the federal statute because the Act was "penal" in nature. Even though Rhode Island enforced penal claims under state law, the state court chose not to enforce federal penal law because it is law imposed by the federal government, a government the Rhode Island court considered "foreign in the international sense."¹⁸

The United States Supreme Court reversed, rejecting the state court's assumption that federal penal law has the same status as the penal law of a foreign nation. "Such a broad assumption," Justice Black wrote for the Court, "flies in the face of the fact that the States of the Union constitute a nation. It disregards the purpose and effect of [the Supremacy Clause]."¹⁹ Any lingering doubts of state court duties to enforce federal law, the Court concluded, vanished after the Civil War and the Court's decision in *Claflin v. Houseman*,²⁰ which held that state courts are to be presumed competent to adjudicate federal claims.²¹

Testa is universally hailed as the decision that formally recognized Congress' power to impose upon state courts a duty to hear federal claims. As the Court

16. 330 U.S. 386 (1947).

17. 56 Stat. 23-37 (1942). Section 205(e) of the Act authorized any action under the statute to be "brought in any court of competent jurisdiction." *Id.* at 35. Section 205(c) granted concurrent jurisdiction in district, state, and territorial courts for civil suits. *Id.* at 33.

18. *Testa*, 330 U.S. at 388.

19. *Id.* at 389.

20. 93 U.S. 130 (1876). The Court's reliance on *Claflin* as support for state court duties to enforce federal law is questionable since all *Claflin* established was state court power to hear federal cases "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." *Id.* at 136; see also Michael Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 49.

21. See *Testa*, 330 U.S. at 390-92. See also Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 313 (1976).

itself subsequently stated, *Testa* held "that Congress could constitutionally require state courts to hear and decide Emergency Price Control Act cases involving the enforcement of federal penal laws."²² In a later decision Justice Scalia, speaking for the Court, made a similar, but stronger claim: "*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause."²³

Both of these pronouncements by the Court are accurate, as far as they go. But it is as important to emphasize what the *Testa* Court did not decide as much as what it did decide. While the *Testa* Court quite clearly held that the Supremacy Clause required the state courts to obey a valid federal law which obligated them to adjudicate federal claims,²⁴ at no point did the Court explain why a federal statute commanding the state courts to adjudicate claims arising under that statute is constitutionally valid in the first place.

The question is by no means frivolous. The federal government is a government of limited powers: It may perform only those tasks and accomplish only those objectives which the Constitution authorizes. Unless Congress can properly ground the commandeering of the state judiciaries somewhere within its constitutionally authorized powers, then nothing in the Supremacy Clause itself directs the state courts to obey the federal statute commandeering the state courts.²⁵ Indeed, in such an event, the Clause would actually dictate that the state courts *not* obey a statutory command to adjudicate federal claims. This is because, by its terms, the Supremacy Clause directs that the Constitution itself be the supreme law of the land,²⁶ and if a federal statute is not constitutionally authorized, it would violate the Constitution to enforce that statute.

The Supremacy Clause does not provide an independent source of congressional power. It merely requires the state courts to enforce federal laws that find their authorization elsewhere in the Constitution. In *Testa*, the Court merely assumed that Congress possesses the constitutionally authorized power to commandeer.²⁷ The opinion in no way explains what is the source of this constitutional power.

B. Printz v. United States: The Misguided Search for the Constitutional Source of the Commandeering Power

In *Printz v. United States*,²⁸ the Court considered the constitutionality of the

22. *Palmore v. United States*, 411 U.S. 389, 402 (1973); *see also* *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 682 (1982) ("State courts are duty bound to apply federal as well as local 'uniform rules of conduct.'") (citing *Testa*, 330 U.S. at 386).

23. *Printz v. United States*, 117 S. Ct. 2365, 2381 (1997).

24. *Testa*, 330 U.S. at 389-90.

25. U.S. CONST. art. VI, cl. 2.

26. U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land").

27. *Testa*, 330 U.S. at 392.

28. 117 S. Ct. 2365, 2368 (1997).

Brady Handgun Violence Prevention Act.²⁹ The statute ordered state and local law enforcement officials to conduct background checks on individuals who sought to purchase handguns.³⁰ The case turned on whether the Constitution prohibits the federal commandeering of state executive officials.³¹ However, Justice Scalia, speaking for the Court, also felt compelled to address the constitutional power of Congress to commandeer state judicial officials.³² If one were to assume that Congress may impress the state courts into its service, then unless the Court finds a basis for limiting the constitutional source of the commandeering power solely to state judges, it would logically follow that Congress can commandeer state executive officers because at least since its decision in *Testa*³³ the Supreme Court has firmly recognized such a judicial commandeering power. Unless Justice Scalia could adequately distinguish the two situations, he would have to face a serious dilemma. He would either be forced to recognize the validity of *both* forms of commandeering (a conclusion he quite obviously did not wish to reach), or he would have to recognize the validity of *neither* form. Either conclusion would clearly be inconsistent with long established doctrine and practice. In struggling to find a constitutional basis for the distinction he so clearly wished to draw, Justice Scalia did much to confuse understanding of the true source of constitutional authorization for the judicial commandeering power.

Justice Scalia posited three conceivable methods by which to distinguish constitutionally the power to commandeer state courts from the power to commandeer state executive officers. Initially, Justice Scalia pointed to what he considered the unique historical basis supporting the judicial commandeering power.³⁴ The Constitution, he wrote, was originally understood to allow federal "imposition" on state judges to enforce federal prescriptions appropriately related to matters "for the judicial power."³⁵ In support of this claim, Justice Scalia cited numerous statutes enacted by the early Congresses.³⁶ For example, early congressional statutes addressed state court conduct in naturalization proceedings. Congress required state courts to record citizenship applications,³⁷ to send naturalization records to the Secretary of State,³⁸ and to register and issue registry certificates to aliens seeking naturalization.³⁹ Beyond the naturalization realm, Congress required state courts to resolve a particular dispute between a

29. 18 U.S.C. §§ 922(s)-(t), 925A (1994 & Supp. I 1995 & Supp. II 1996).

30. *Id.* § 922(s).

31. *Printz*, 117 S. Ct. at 2368.

32. *Id.* at 2371.

33. *Testa v. Katz*, 330 U.S. 386 (1947).

34. *Printz*, 117 S. Ct. at 2371.

35. *Id.*

36. *Id.* at 2371-72.

37. Act of Mar. 26, 1790, ch.3, § 1, 1 Stat. 103 (repealed 1795).

38. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (repealed 1802).

39. Act of Apr. 14, 1802, ch. 28 § 2, 2 Stat. 154-55 (repealed 1918).

captain and his crew,⁴⁰ to hear slave owner claims regarding seized fugitive slaves,⁴¹ to issue certificates authorizing the forced return of seized fugitive slaves,⁴² to take proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War,⁴³ and to deport alien enemies during wartime.⁴⁴ Justice Scalia reasoned that these statutes established an early congressional understanding that the Constitution permits the federal commandeering of state judicial officials.⁴⁵

This early congressional understanding, Justice Scalia argued, is supported by the Constitution's text, both implicitly and explicitly.⁴⁶ The Constitution's implicit support, Scalia asserted, derives from the so-called Madisonian Compromise.⁴⁷ That compromise led to the Constitutional Convention's decision to permit, rather than to require, the creation of lower federal courts.⁴⁸ Accordingly, Article III, Section 1 of the U.S. Constitution requires creation of the Supreme Court, yet makes the creation of lower federal courts optional, "even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States."⁴⁹ Justice Scalia reasoned that the Madisonian Compromise, when combined with the "obvious"⁵⁰ fact dictated by explicit constitutional text,⁵¹ that the Supreme Court could not hear all federal

40. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132 (codified as amended at 46 U.S.C. § 654-655 (1994)).

41. Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302-305 (codified as amended at 18 U.S.C. § 658-663 (1994)).

42. *Id.*

43. Act of Apr. 7, 1798, ch. 26 § 3, 1 Stat. 548 (expired).

44. Act of July 6, 1798, ch. 66, § 2, 1 Stat. 577-78 (expired).

45. *Printz v. United States*, 117 S. Ct. 2365, 2371 (1997). In contrast, Justice Scalia found no early (or even pre-Twentieth Century) federal statute compelling state executive officers to administer federal law. *Id.* at 2371 n.2.

46. *Id.* at 2371.

47. *Id.*

48. See generally CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 327 (1928); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1610 (1990); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46 (1975).

But see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 819 (1984). Despite the plain language of Article III, some scholars have argued that the creation of lower federal courts is a constitutional necessity. Lawrence G. Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 34 (1981). But see Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 145 (1982).

49. *Printz*, 117 S. Ct. at 2371.

50. *Id.*

51. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power of the United States, shall be

cases, necessarily implies that if Congress were to choose not to create lower federal courts, out of necessity state courts would be required to adjudicate federal causes of action.⁵² Thus, Justice Scalia reasoned in *Printz*, a logical corollary of the Madisonian Compromise must be that the Constitution permits federal conscription of state courts as at least initial adjudicators and enforcers of federal law.⁵³

The Constitution's explicit textual support for federal commandeering, Justice Scalia stated, is found in the so-called "State Judges Clause," included within the Supremacy Clause, which provides: "The Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁵⁴ The State Judges Clause, Scalia argued, views state courts "distinctively."⁵⁵ This view of the distinctive nature of state judiciaries, he reasoned, establishes a power to commandeer state judges that does not similarly apply to state executive officers.⁵⁶ The Constitution's distinction of state courts from state executive officers is "understandable," Justice Scalia added, because only state courts have "applied the law of other sovereigns all the time."⁵⁷ In sum, the Court in *Printz* read the Madisonian Compromise as implicit constitutional authorization and the State Judges Clause as explicit constitutional authorization for the congressional power to commandeer state judicial officials.⁵⁸

By expressly grounding the judicial commandeering power in the

vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

52. *Printz*, 117 S.Ct. at 2371. Justice Scalia, however, failed to explicitly elaborate upon this constitutionally implicit argument. Justice Scalia's argument, in its entirety, is as follows: "In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States." *Id.* (citing WARREN, *supra* note 48, at 325-27 (1928)).

53. *Id.*; see also Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1618 n.257 (1986) ("[S]tate courts could entertain cases within the judicial power of the United States."); Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1156 (1984) ("State courts have a general obligation to hear federal claims."). But see Collins, *supra* note 20, at 43 ("[S]tate courts were thought to be able to entertain Article III business only because of powers granted to them under state law, rather than because of powers or duties expressly or impliedly conferred on them by federal law or the Constitution.").

54. U.S. CONST. art. VI, cl. 2.

55. *Printz*, 117 S. Ct. at 2371.

56. *Id.*

57. *Id.*

58. *Id.* Prior to *Printz*, in *New York v. United States*, 505 U.S. 144, 178-79 (1992), the Court had suggested reliance on the State Judges Clause as the basis for distinguishing the judicial commandeering power from the power to commandeer state legislatures.

Madisonian Compromise and the State Judges Clause, Justice Scalia in *Printz* could effectively draw a dichotomy between the executive and judicial commandeering authorities, because these constitutional rationales uniquely concerned the power to commandeer state judiciaries. The validity of the Court's conclusion that the judicial commandeering power is properly grounded in the Madisonian Compromise and the State Judges Clause, however, is subject to serious question.

Initially, the implications that the Court draws from the Madisonian Compromise extend considerably further than is logically permissible. It is reasonable to infer from the history of the Madisonian Compromise that the framers proceeded under the assumption that if Congress chose not to create lower federal courts, the state courts would somehow have to be made available to provide an initial forum for the adjudication of federal claims. However, an implicit assumption on the part of the framers is not a constitutional authorization. It merely means that the framers would necessarily have recognized their obligation to establish such federal authority somewhere else within the Constitution's text.

Thus, the fact that the framers apparently assumed the existence of a commandeering power says absolutely nothing about exactly where in the Constitution's text that commandeering power is authorized. If the power is ultimately found to have been lodged in a provision or combination of provisions which establish a federal authority that is, by its terms, not limited to the commandeering of state judicial officers,⁵⁹ then reliance on the Madisonian Compromise does not justify the *Printz* Court's conclusion that the commandeering power is confined to state judicial officers.

Additionally, as a matter of logic, there appears to be no reason why the exact same rationale used to commandeer state judicial officials cannot be utilized to support federal authority to commandeer state executive officers. While the Constitution dictates the existence of the executive branch, it says nothing about the existence of federal executive officers beneath the President and Vice-President.⁶⁰ Could not the federal government, then, decide that instead of creating a separate federal executive sub-branch, the President could perform the tasks of the executive branch more effectively using state executive officers? If so, the power to commandeer state executive officers would be directly analogous to the rationale used to justify the power to commandeer state judges.

The *Printz* Court's reliance on the State Judges Clause within the Supremacy Clause as the textual source of the federal power to commandeer the state courts is not persuasive. The Supremacy Clause performs a significant role in assuring state judicial compliance with constitutionally valid federal laws. However, by its explicit terms the Clause does not itself create federal authority; it simply requires that state officials generally and state judges in particular obey valid

59. As we argue, that power is appropriately found in Article I, which does not confine the federal commandeering power to state judicial officers. See discussion accompanying *infra* notes 93-94.

60. U.S. CONST. art. II.

exercises of federal authority.⁶¹ Thus, nothing in the Supremacy Clause in general or the State Judges Clause in particular says anything about the actual constitutional source of the federal government's authority to act in the first place.⁶² It would, then, constitute wholly improper bootstrapping to rely on a provision that on its face does nothing more than bind state courts to enforce only those federal laws enacted pursuant to an independent constitutional source of power to commandeer state courts. It is the congressional statutes which the state courts must enforce that require state courts to enforce federal claims. Surely, the provision that obligates state courts to enforce valid federal laws does not tell us whether those laws are constitutionally valid. The Supremacy Clause, then, deems validly enacted federal laws to be supreme, but the Clause itself does not grant Congress the power to adopt those laws in the first place. In other words, other provisions of the Constitution must initially authorize Congress to enact a particular law; the Supremacy Clause orders state officers to obey that valid federal law.⁶³

There are, then, two entirely distinct issues to be resolved: (1) the constitutional source of the federal power to commandeer, and (2) the constitutional source of the obligation of state officials to obey the exercise of the federal commandeering power. The Supremacy and State Judges Clauses deal only with the latter question. This vital distinction appears to have been completely ignored or misunderstood by the *Printz* Court.⁶⁴

61. U.S. CONST. art. IV, cl. 2.

62. Professor Hoke has suggested a slightly different perspective on the Supremacy Clause. S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 845 (1992). She wrote:

The Clause [] creates a favored class of law, that which is denominated "supreme Law." By its terms, the only government that has the opportunity to convert its legal norms into "supreme Laws" is the national government, and the Clause mandates that the judges "in every State" are bound by this national law. To guard against any misconceptions as to the meaning of "supreme Law," the paragraph details that state law "Contrary" to the Constitution shall not stand. The one threshold that national law must traverse on the way to obtaining the brass ring of supremacy is that the law in question must be "in Pursuance" of, or consistent with, the Constitution.

Id. (footnotes omitted).

63. See also Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 774 (1994) ("The Supremacy Clause does not empower, but rather resolves a particular problem arising out of the powers granted by other parts of the Constitution: namely, conflicts resulting from concurrent state and federal powers.").

64. The Court had similarly assumed the existence of federal power to commandeer state courts in *New York v. United States*, 505 U.S. 144 (1992). In *New York*, the Court struck down the "take title" provision of a radioactive waste disposal statute because the statute unconstitutionally commandeered state legislative officials. *Id.* at 180. Faced with the fact that the Court previously had authorized federal directives to state courts, the *New York* Court was forced to distinguish commandeering of state courts from state legislatures. The Court distinguished the "well established power of Congress to pass laws enforceable in state courts," by stating: "Federal

Justice Scalia's opinion in *Printz* reads only the first part of the Supremacy Clause as exclusively an implementational clause.⁶⁵ He construes the State Judges Clause, on the other hand, to provide Congress with a free-standing power to commandeer state judges. This reading of the State Judges Clause, however, is fraught with errors.

Most significantly, *Printz*'s construction of the State Judges Clause undermines the overall structure of the Supremacy Clause. The Court's interpretation of the State Judges Clause finds the power to commandeer state courts to be *sui generis*, and therefore, the Court holds that when the Constitution dictates that state judges be "bound" by "supreme Law," it is granting Congress the power to order state judges, but no other state officials, to enforce federal prescriptions.⁶⁶ This reading, however, destroys the structure of the Supremacy Clause by arbitrarily divorcing the State Judges Clause from its broader context.⁶⁷

statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate." *Id.* at 178-79.

This proffered distinction between state courts and state legislative conscription is erroneous. As the previous discussion of *Testa v. Katt*, 330 U.S. 386 (1947), illustrates, there is a huge difference between the Constitution's authorization of the power to commandeer and the Constitution's authorization of the power to enforce a commandeering directive (or any other constitutionally enacted statute). *New York* appears only to have dealt with the latter.

The Court in *New York* stated that the Supremacy Clause contained the authorization of power that directed state judges to enforce federal statutes. *New York*, 505 U.S. at 178-79. This is an uncontroverted point. When a valid federal law is enacted, the Supremacy Clause orders state judges to enforce that valid federal law. On the other hand, the Court never made the more dubious assertion that it did in *Printz* that the Supremacy Clause (and its State Judges Clause component) renders a commandeering statute constitutional. The way to determine if a commandeering statute is constitutional is to review Congress' Article I enumerated powers and the Necessary and Proper Clause. The Court in *New York* was right to read the Supremacy Clause as an implementing provision, but wrong to use that as a distinguishing factor to permit state court commandeering but prohibit state legislature commandeering. After all, if supremacy is to have any meaning, federal law must be supreme for state courts, state executive officers, and state legislatures alike.

65. *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997). Justice Scalia stated: The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution];" so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

Id. (quoting U.S. CONST. art. VI, cl. 2).

66. See generally discussion accompanying *supra* notes 57-58.

67. Some might argue that separating the State Judges Clause from the remainder of the Supremacy Clause is appropriate since the State Judges Clause proceeds after a semi-colon; since semi-colons divide separate clauses that otherwise could be complete sentences on their own, see TEXAS LAW REVIEW, TEXAS MANUAL ON USAGE & STYLE B:11:1 (8th ed. 1995) (semi-colons

The Supremacy Clause, in its entirety, requires judges to be “bound” only by “supreme Law,” and the only federal laws that are “supreme” are the ones “made in Pursuance” of the Constitution.⁶⁸ The threshold inquiry should therefore be: Is a federal law that commandeers state courts “made in Pursuance” of the Constitution? If the answer is no, then state courts are not “bound” by federal commandeering. If the answer is yes, then state courts are bound, no matter what their state law says. Either way, one point is clear: The State Judges Clause tells a state judge what to do with a constitutionally enacted law,⁶⁹ but does not transform a law that otherwise exceeds enumerated federal powers into a constitutionally valid law.⁷⁰

separate independent clause), the State Judges Clause is properly considered separate from the rest of the Supremacy Clause. This argument fails for two reasons. First, it ignores other uses of semi-colons in the Constitution that do not demark separate sentences. *See, e.g.*, U.S. CONST. art. IV, § 4 (“; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”); U.S. CONST. art. III, § 2, cl. 1 (“;—to all Cases affecting Ambassadors, other public Ministers and Consuls;”); U.S. CONST. art. II, § 1, cl. 4 (“; which Day shall be the same throughout the United States.”). Second, this argument ignores the actual words of the State Judges Clause, which orders state judges to be “bound thereby.” What is it that state judges are to be “bound thereby”? That answer lies in the part of the Supremacy Clause that precedes the semi-colon.

68. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof”).

69. *See also* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1833, at 697 (1833). Justice Story writes:

It is melancholy to reflect, that, conclusive as this view of the subject is in favour of the supremacy clause, it was assailed with great vehemence and zeal by the adversaries of the constitution; and especially the concluding clause, which declared the supremacy, “any thing in the constitution or laws of any state to the contrary notwithstanding.” And yet *this very clause was but an expression of the necessary meaning of the former clause, introduced from abundant caution, to make its obligation more strongly felt by the state judges.* The very circumstance, that any objection was made, demonstrated the utility, nay the necessity of the clause, since it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution.

Id. (emphasis added).

70. The same point emerges from *Howlett v. Rose*, 496 U.S. 356 (1990), the first Supreme Court case ever to mention the State Judges Clause as a specific source of state court duty to enforce federal law. *See also* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM L. REV. 1001, 1035 (1995) (arguing that previous Supreme Court cases before *Howlett*, like *Testa v. Katt*, 330 U.S. 386 (1947), had only relied upon general terms and principles underlying the Supremacy Clause). The Court in *Howlett* stated that the State Judges Clause “confirm[s] that state courts have the coordinate authority and consequent responsibility to enforce the supreme law of the land.” *Howlett*, 496 U.S. at 369-70 n.16. (emphasis added). (The Court actually stated that it was referring to the “language of the Supremacy Clause,” and not necessarily the State Judges Clause, but that

As the Constitution's source for the assurance of federal supremacy over conflicting state law, the Supremacy Clause binds state executive officers and legislatures in exactly the same manner in which it binds state judicial officers: All three groups of state officers are constitutionally disabled from ignoring or subverting applicable federal law. State courts, of course, must enforce applicable federal law over conflicting state law.

The *Printz* Court's construction of the State Judges Clause as the exclusive authorization of a federal power to commandeer might be defended on the basis of the well accepted canon of construction that language contained in an authoritative text should not be construed in a manner that renders it superfluous. If the Supremacy Clause as a whole were construed to do nothing more than bind all state officers, including state judges, to obey valid and controlling federal law, then what purpose is served by inserting additional language in the State Judges Clause? After all, under a construction of the Supremacy Clause that draws no distinction between the State Judges Clause and the remainder of the Supremacy Clause, the legal impact on state courts would be the same, whether or not the specific reference to state judges had been included. Thus, it could be argued, insertion of the specific reference to the obligations of state judges must have the effect of binding state judges in an exclusive manner, otherwise the words of the State Judges Clause would be rendered entirely superfluous. Under this argument of construction, construing the State Judges Clause to establish an exclusive federal power to commandeer, as the Court in *Printz* did,⁷¹ provides an acceptable explanation of the unique function performed by inclusion of the State Judges Clause.

This redundancy objection, however, is unpersuasive. Initially, it should be noted that nothing in this argument alters the indisputable fact that by its express and unambiguous language, the State Judges Clause cannot reasonably be construed as an independent authorization of federal power. Instead, by its terms, the Clause provides merely that state judges are bound by supreme federal law, including the Constitution.⁷² It says absolutely nothing about how one determines whether a federal statute is in fact authorized by that Constitution. If a federal statute is not so authorized, then the state courts are obligated to ignore its directives, because of all federal law the Constitution is supreme.

language is the State Judges Clause. *Id.* The Court stated, in full, "The language of the Supremacy Clause—which directs that 'the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Id.*) The only laws that are the "supreme Law of the Land" are those passed pursuant to the Constitution. U.S. CONST. art. VI, cl. 2. To see if federal commandeering statutes are passed pursuant to the Constitution requires us to look elsewhere in the Constitution. The provisions in the Constitution that answer the threshold question of whether or not commandeering statutes should be deemed valid federal law is in the enumeration of powers in Article I and the Necessary and Proper Clause. See discussion *infra* Part I.C.

71. See generally discussion accompanying *supra* notes 51-56.

72. U.S. CONST. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.").

While the interpretational canon creating a presumption against textual redundancy may reasonably influence which of two or more textually conceivable constructions may be adopted, it cannot authorize adoption of an interpretation that is unambiguously inconsistent with the plain meaning of the textual provision.

In any event, the redundancy in the text of the Supremacy Clause could conceivably have been intended to serve a vital political function of providing emphasis and avoiding any conceivable future interpretational ambiguity. As Professors Calabresi and Prakash have persuasively argued, on occasion “[r]edundancy . . . is built in to reiterate an important point—to make sure that the point does not get lost.”⁷³ In just this manner, both the State Judges Clause and the Supremacy Clause work together to emphasize both the primacy of federal law over conflicting state law and the obligation of the state courts to recognize that primacy.⁷⁴

Even a casual examination of the political circumstances surrounding the Constitution’s framing demonstrates why the framers might have wanted textually to underscore the state judicial obligation to enforce federal law, at the expense of otherwise applicable state constitutional provisions and statutes. As Edmund Randolph stated, “The National authority needs every support we can give it We are erecting a supreme national government; ought it not be supported, and can we give it too many sinews?”⁷⁵ The Supremacy Clause defines federal law as supreme and the State Judges Clause provides the exclamation point on this directive.⁷⁶ Additionally, Professor Rakove has

73. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 585 (1994).

74. The Oath or Affirmations Clause, U.S. CONST. art. VI, cl. 3., similarly emphasizes the dominance of federal law over conflicting state law. The Oath or Affirmations Clause binds State judges “by Oath or Affirmation, to support this Constitution.” *Id.* No new power has been granted to any branch of the federal government. Instead, the Oath or Affirmations Clause strengthens the Supremacy and State Judges Clause by asking state officers to guarantee, on their word, that they will follow the commands of validly enacted federal law. *See also* THE FEDERALIST No. 27, at 174-75 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961). Hamilton argued:

It merits particular attention in this place, that the laws of the confederation, will become the SUPREME LAW of the land; to the observance of which, all officers legislative, executive and judicial in each State, will be bound by sanctity of an oath. Thus the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government, *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.

Id.

75. Records of the Federal Convention, Mr. Randolph, June 11, 1787 (1:203; Madison).

76. Professor Caminker calls this the “nullification rule.” Caminker, *supra* note 70, at 1036 (“[The State Judges] Clause operates more narrowly as a simple conflict-of-law provision requiring state judges to nullify provisions of state law that conflict with federal law.”). Professor Prakash wrote that the Supremacy Clause and State Judges Clause tell state judges, “these new federal laws

recently documented the framers' concerns that state judges, who lacked the prophylactic protections of their independence from the political branches of government which their federal counterparts were about to receive,⁷⁷ would be unable to resist the political pressures from the state legislative and executive branches to enforce applicable state law, even when it conflicted with federal law.⁷⁸ The obligation explicitly imposed on state judiciaries by the State Judges Clause to disregard even state constitutional provisions when they conflict with applicable federal law, then, can be seen as an attempt to provide the state courts with textual fortification against those internal political pressures.⁷⁹ Nothing in this reasoning, however, in any way supports a construction of the State Judges Clause—in direct contradiction to the Clause's explicit terms—as an independent constitutional source of federal power to commandeer state courts.

In sum, the text, structure and history of the Supremacy Clause as a whole clearly establish that one clause functions exclusively as a “dispute resolution mechanism.”⁸⁰ When a constitutionally valid federal law contradicts otherwise applicable state law, then federal law controls. To remove the middle few words of the Supremacy Clause from their broader context is to ignore the clearly limited purposes served by the Supremacy Clause as a whole.⁸¹

It should be recalled that in grounding the federal power to commandeer state courts in the State Judges Clause, the Court in *Printz* sought to draw a constitutionally based distinction between the federal power to commandeer state judicial officers and the federal power to commandeer state executive officers.⁸² The *Printz* court sought to draw such a distinction in order to prohibit the exercise of federal power over state executive officers, while simultaneously

are the laws of your state; enforce them as you would any other, making sure that federal law is always vindicated when a conflict with state law arises.” Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2011 (1993); see also Hoke, *supra* note 62, at 879 (“The second aspect [of the Supremacy Clause] explicitly instructs judges to apply the supreme law as the operative rules of decision, and to set aside any contrary state law.”).

77. See U.S. CONST. art. III, § 1: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuation in Office.”

78. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 173-74*, 177 (1996).

79. See *id.*

80. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 804 (1996).

81. Professor Caminker rightfully rejects a construction of the State Judges Clause as the textual source for federal commandeering power. However, he argues that the “broader principle of the Supremacy Clause,” which is that “every congressional law establishes policy for the states no less than laws enacted by state legislatures,” authorizes the commandeering of state courts. Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Federalism*, 1997 SUP. CT. REV. 199, 215. This reading of the Supremacy Clause—like the Court’s—erroneously reads the Supremacy Clause to be something more than a mere implementing provision.

82. *Printz v. United States*, 117 S. Ct. 2365, 2371 (1997).

preserving the established federal authority over state judiciaries.⁸³ The Court's purpose, in short, was to protect the states against at least one form of potential federal interference with the states' exercise of their sovereign power. Ironically, however, by grounding the judicial commandeering power in the State Judges Clause, the *Printz* Court may actually, albeit unwittingly, have expanded federal power to disrupt the exercise of state sovereign power.

Under the Court's construction of the State Judges Clause, the federal government appears to possess unlimited power to commandeer state courts, regardless of the severity of the resultant burdens on the courts. This conclusion follows because there is absolutely nothing in the language of the State Judges Clause that could be construed to authorize the imposition of such a limitation. Had the Court instead chosen to ground the commandeering power within a combination of Congress' enumerated powers and the Necessary and Proper Clause of Article I, as we argue it must be, whatever limits on federal power that might be inferred from the language of that Clause⁸⁴ would naturally have applied to any federal commandeering of state judges.

In addition to the serious textual, logical and political flaws in the *Printz* Court's explanation of the federal power to commandeer state courts, it is also impossible to reconcile the Court's acceptance of such a power with the political theory of federalism which the *Printz* Court expressly adopts. In rejecting federal power to commandeer state executive officers, the *Printz* Court expressly adopted a theory of "dual federalism,"⁸⁵ pursuant to which the state and federal political structures and jurisdictions are deemed mutually exclusive.⁸⁶

The *Printz* Court relied on the theory of dual federalism in order to support its rejection of a federal power to commandeer state executive officers. Under a dual federalism model, federal officers may not exercise state power and state officers may not exercise federal power.⁸⁷ This conclusion follows logically

83. *Id.*

84. See Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (arguing that use of word "proper" dictates significant limitations on congressional power under the Necessary and Proper Clause).

85. *Printz*, 117 S. Ct. at 2376 (stating that dual federalism is an "essential postulate []" of Constitution). It should be noted that the theory of dual federalism is subject to serious normative and historical doubt. See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 26-33 (1995).

86. According to famed political scientist Edward Corwin, the theory of dual federalism represents the synthesis of four axioms:

1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are "sovereign" and hence "equal"; 4. The relation of the two centers with each other is one of tension rather than collaboration.

Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

87. See Alphens Mason, *Federalism: The Role of the Court*, in *FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 24-25 (Valerie A. Earle ed. 1968) ("[Dual federalism] envisions

from the essential premise of dual federalism, that the powers of the two governmental systems are mutually exclusive. If that is so, however, then the Court's acceptance of a federal power to commandeer state judicial officers is puzzling, because the exercise of federal power by state judicial officers would appear to be as impermissible under a dual federalism model, as would the exercise of federal power by state executive officers. Under such a theory, a federal power to commandeer any branch of state government, legislative, executive or judicial, would be impermissible, for the simple reason that under a theory of dual federalism no unit of state government may legitimately exercise federal authority. Thus, the Court in *Printz* failed completely to explore the full theoretical ramifications of its adopted dual sovereignty model for the recognized federal power to commandeer state courts.

To be sure, Justice Scalia in *Printz* purported to find what he considered explicit *textual* support for a judicial commandeering power, in the language of the State Judges Clause.⁸⁸ While we have rejected this conclusion purely as a matter of textual interpretation,⁸⁹ the Court might reason that if one assumes the correctness of its textual interpretation, that provision exempts state courts from the otherwise pervasive reach of the dual federalism model. However, by its nature, the theory of dual federalism inherently precludes such piecemeal exemption.⁹⁰ Simply stated, there can be no such thing as partial mutual exclusivity. Thus, acceptance of the Court's construction of the State Judges Clause renders dubious the Court's adoption of the dual federalism model in the first place. Yet it was only by reliance on this very theory that the Court was able to reject the existence of a federal power to commandeer state executive officials.

C. Article I as an Authorization of the Federal Power to Commandeer State Courts

As the previous section has demonstrated, constitutional text, structure, and history demonstrate that the State Judges Clause cannot serve as the source of federal power to commandeer state courts. This does not mean, however, that the Supreme Court was incorrect in either *Testa*⁹¹ or *Printz*⁹² when it found that the federal government could constitutionally commandeer the state judiciaries as interpreters of federal law and enforcers of federal claims. It is true that no other constitutional provision explicitly authorizes the commandeering of state courts. The proper constitutional source of the federal commandeering power, however,

two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions.”).

88. *Printz*, 117 S. Ct. at 2371.

89. See discussion accompanying *supra* notes 61-62.

90. See REDISH, *supra* note 85, at 27.

91. *Testa v. Katt*, 330 U.S. 386 (1941).

92. *Printz v. United States*, 117 S. Ct. 2365 (1997).

is the enumerated congressional powers contained in Article I, Section 8,⁹³ read in conjunction with the Necessary and Proper Clause. The Necessary and Proper Clause provides that Congress may “make all Laws which shall be necessary and proper for carrying into execution the foregoing [Article I] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁹⁴ As such, the Clause provides Congress with ancillary authority to facilitate enumerated powers.⁹⁵ For example, although the Commerce Clause grants Congress authority to regulate only commerce among the several states or with foreign nations,⁹⁶ the Court has construed the Necessary and Proper Clause to authorize Congress to regulate intrastate commerce when to do so will facilitate Congress’ regulation of interstate commerce.⁹⁷

Similarly, federal power to commandeer state courts is appropriately grounded in a combination of an enumerated power and auxiliary authority under the Necessary and Proper Clause. Thus, when Congress enacts a substantive federal statute pursuant to its commerce power, Congress’ decision to require state court enforcement of that statute’s cause of action can readily be seen as a means of perfecting or facilitating attainment of Congress’ substantive regulatory goals embodied in the statute.⁹⁸

The majority opinion in *Printz*, however, openly dismissed the use of the Necessary and Proper clause as a textual basis on which to ground the federal commandeering power.⁹⁹ Relying on the theory of dual federalism (which, we

93. U.S. CONST. art. I, § 8.

94. U.S. CONST. art. I, § 8, cl. 18.

95. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819) (“Even without the aid of the general clause in the constitution, empowering congress [sic] to pass all necessary and proper laws for carrying out its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted.”).

96. U.S. CONST. art. I, § 8, cl. 3.

97. See, e.g., *United States v. Darby*, 312 U.S. 100, 119-20 (1941).

98. Most likely the enumerated power will be the Commerce Clause. However, commandeering of state courts does not have to emanate from that clause. Congress could require state courts to hear certain civil rights cases under Congress’ power in Section 5 of the Fourteenth Amendment. See *Redish & Muench*, *supra* note 21, at 345. Alternatively, Congress could commandeer, in certain circumstances, pursuant to its enumerated power to make uniform naturalization laws.

99. Despite *Printz*’s invalidation of the Brady Act, it is arguable that a majority of the Court actually endorses the Commerce and Necessary and Proper Clauses as the textual source for federal commandeering power. All four dissenting Justices in *Printz* found the Commerce Clause and the “additional grant of authority” in the Necessary and Proper Clause as adequate textual support for state executive commandeering. *Printz v. United States*, 117 S. Ct. 2365, 2387 (1997). The crucial fifth vote for the Necessary and Proper reading adopted in this paper might come from Justice Thomas. Justice Thomas wrote a concurrence in *Printz* that arguably followed an enumerated power plus necessary and proper analysis of federal commandeering. Justice Thomas felt that the Brady Act’s regulation of the purchases of handguns did not fall under Congress’ commerce power.

have already shown, undermines the Court's acceptance of a judicial commandeering power),¹⁰⁰ Justice Scalia held that the Brady Act's commandeering of state executive officers violated residual principles of state sovereignty.¹⁰¹ Even though such principles do not appear in the text of the Constitution, Justice Scalia's opinion deemed laws which violated them not to be proper, pursuant to the requirements of the Necessary and Proper Clause.¹⁰²

So radical a construction of the Necessary and Proper Clause is unsupported by either precedent or constitutional structure.¹⁰³ Such an open-ended construction of the limitations inherent in the Necessary and Proper Clause would effectively authorize judicial reliance on ill-defined principles of natural law and the personal ideologies of the judges, a result wholly inconsistent with Justice Scalia's staunch criticism of such freewheeling judicial lawmaking in other contexts.¹⁰⁴

Indeed, the *Printz* Court's rejection of the federal power to commandeer state executive officers perfectly illustrates such improper judicial lawmaking. Because executive commandeering is apparently inconsistent with the Court's vague notions of dual federalism, a theory that has at best extremely questionable grounding in the nation's history¹⁰⁵ and is in any event inherently inconsistent with the very practice of judicial commandeering which the Court so willingly accepts,¹⁰⁶ the Court concludes that such commandeering is "improper" and therefore unconstitutional.¹⁰⁷ If the judiciary is able to restrict congressional power on the basis of such an ill-defined, unguided constitutional directive, then no meaningful limit on uncontrolled judicial activism remains. It is ironic that such a result is reached in an opinion authored by the Justice who purports to be staunchly opposed to such improper judicial behavior.

Id. at 2385 (Thomas, J., concurring) ("In my 'revisionist' view, the Federal Government's authority under the Commerce Clause . . . does not extend to the regulation of wholly intra state, point-of-sale transactions."). Without Article I power to regulate firearm sales, Thomas continued, Congress "surely lacks the corollary power" to commandeer state executive officials into regulating firearm sales. *Id.* This looks like a Necessary and Proper inquiry. The Necessary and Proper Clause can never transform a congressional regulation of a purely intrastate transaction into a constitutionally valid regulation—which is why the Commerce Clause, even when combined with the Necessary and Proper Clause, simply does not reach the regulation of firearms set forth in the Brady Act.

100. See discussion accompanying *supra* notes 85-90.

101. *Printz*, 117 S. Ct. at 2379.

102. *Id.*

103. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

104. See *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part, dissenting in part) (criticizing courts which find abortion permissible when the Constitution does not require them to do so).

105. See discussion accompanying *supra* notes 85-90.

106. See discussion accompanying *supra* notes 85-90.

107. *Printz v. United States*, 117 S. Ct. 2365, 2384 (1997).

II. THE IMPLICATIONS OF THE COMMANDEERING POWER FOR JUDICIAL FEDERALISM: CONFUSING DEPLOYMENT WITH DEFERENCE

We have so far sought to establish two points. First, there exists no legitimate constitutional basis for distinguishing the federal power to commandeer state executive officers from the power to commandeer state courts. Under appropriate circumstances, Congress may reasonably conclude that reliance on either or both state executive and judicial officers is an appropriate means of facilitating attainment of constitutionally authorized goals.¹⁰⁸ Second, the Constitution authorizes Congress to commandeer state officials solely through a combination of Article I enumerated powers and the Necessary and Proper Clause.

While the Supreme Court has rejected both our suggested rationale for the judicial commandeering power and our conclusion that the rationale dictates the existence of a federal power to commandeer state executive offices, the Court does agree with the fundamental conclusion that the Constitution authorizes a federal power to commandeer state judges in order to aid in the interpretation and enforcement of federal law.¹⁰⁹ What the Court has never fully recognized, however, are the political, constitutional and logical implications behind the theory of judicial federalism from which acceptance of the commandeering power necessarily rises. Hence, in this Part we consider the broader theoretical implications that the judicial commandeering power, regardless of its constitutional source, has for the philosophy of judicial federalism.

A. The Commandeering Power, Judicial Federalism, and the Principle of Federal Dominance

Whatever one thinks of the historical or normative validity of the dual federalism model,¹¹⁰ there can be no question that recognition of the federal power to commandeer state courts undermines any claim that the theory represents our nation's historical tradition. The commandeering power inescapably crosses systemic lines, authorizing, indeed requiring, one sovereign level of governmental authority to exercise the power of the other sovereign level within the federal system, in direct contravention of the precept of mutual exclusivity of sovereign power inherent in the theory of dual federalism.¹¹¹ Ironically, much of the nation's history of judicial federalism similarly supports rejection of any principle of mutual exclusivity of sovereign power. Since the

108. *But see* Prakash, *supra* note 76. Professor Prakash has presented a historical basis for distinguishing legislative commandeering from both executive and court commandeering.

109. *Printz*, 117 S. Ct. at 2371.

110. Compare Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978) (arguing in support of dual federalism model), with DANIEL ELAZAR, *THE AMERICAN PARTNERSHIP* (1962) (favoring model of cooperative federalism over dual federalism model as historically controlling theory of American federalism).

111. *See supra* notes 85-90.

Madisonian Compromise, it has been understood that state courts necessarily possessed at least the potential authority to adjudicate federal law.¹¹² The framers' inclusion of the federal courts' diversity jurisdiction within the categories of cases to which the federal judicial power extends via Article III, Section 2¹¹³ demonstrates that federal courts are empowered to adjudicate claims that derive entirely from state law.

As a general matter, the Supreme Court has gleaned from this jurisdictional intersection precepts of respect for state court abilities to interpret federal law and federal deference to state judicial enforcement of federal law.¹¹⁴ Scholars and jurists have synthesized these principles of respect and deference under the heading of "parity," the belief that state courts are to be deemed fungible with the federal courts as interpreters and enforcers of federal law,¹¹⁵ and that any suggestion to the contrary constitutes an insult to the state judiciaries.¹¹⁶ While the commandeering power has long coexisted with this principle of parity, no one appears to have recognized the troubling implications of the commandeering power for the irrebuttable presumption of parity which the Supreme Court has universally imposed.¹¹⁷

The principle of parity seems to derive, at least in part, from the reasoning that because state courts are just as competent to adjudicate and enforce federal law as are the federal courts, state courts must, therefore, be deemed equivalent to the federal courts as expositors of federal law. Existence of the commandeering power, however, demonstrates that recognition of state court power to adjudicate and enforce federal law derives, not from a concern over avoiding a federal slight to the state judiciaries, but rather from a desire to facilitate the enforcement of federal law and assure federal supremacy.¹¹⁸ If the federal government were unable to commandeer the state courts as enforcers and interpreters of federal law, then state courts could easily circumvent federal law, merely by ignoring conflicting and controlling federal legal standards in the course of their adjudication of state law claims. Moreover, the federal government would be forced to impose the entire burden of the enforcement and adjudication of federal claims on the federal courts.

By requiring state courts to adjudicate federal claims, Congress may spread both the financial and physical efforts required to ensure protection of federal rights between the state and federal systems. In short, governing principles of

112. See discussion accompanying *supra* notes 49-55.

113. U.S. CONST. art. III, § 2.

114. See *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974).

115. See *Younger v. Harris*, 401 U.S. 37 (1971); see also *supra* note 10.

116. See *Steffel*, 415 U.S. at 461.

117. One area in which the Supreme Court has imposed such an irrebuttable presumption is in the area of civil rights removal, 28 U.S.C. § 1443 (1994). See, e.g., *Greenwood v. City of Peacock*, 384 U.S. 808 (1966). See generally MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 375-99 (2d ed. 1990) [hereinafter *TENSIONS IN THE ALLOCATION OF JUDICIAL POWER*].

118. See discussion accompanying *supra* notes 66-67.

judicial federalism breach the parallel lines of authority posited by the dual federalism model, in order to ensure preservation of the primacy and dominance of the federal level of authority within the federal structure.

Thus, the Constitution enables Congress to require state courts to interpret federal law and decide federal claims out of concerns for convenience to the federal government and the assurance of federal supremacy, rather than an affirmative notion of deference to or respect for state courts. “[T]he States of the Union constitute a nation,”¹¹⁹ and state court refusals to enforce federal law splinters the nation. No supreme law could exist if state courts could refuse to enforce valid federal law. Otherwise, the supreme law would be the law that state courts decide to enforce.

There are two conceivable contexts in which the commandeering power could come into play, and both underscore the extent to which the commandeering power reflects the goal of assuring federal supremacy. First, Congress may require state courts to hear suits brought to enforce rights under federal statutes. *Testa* itself provides an illustration of this context.¹²⁰ If the state courts were not empowered to conduct such adjudication or if Congress was incapable of commandeering them, then one of two consequences would necessarily follow: Either the entire litigation burden would fall on the federal courts, or those whom Congress sought to protect would be unable to efficiently enforce their federally created rights. The federal government could quite reasonably find both results to be unacceptable. The only way these results could be avoided is by rendering the state courts fully competent to adjudicate federal rights and enabling Congress to commandeer them for that purpose.

It does not necessarily flow from the constitutional and congressional decisions vesting state courts with authority to adjudicate federal claims, however, that state courts are to be deemed the equal of their federal counterparts as interpreters of federal law. Such a conclusion does not inherently follow, just as the assumption that military reserve units, which have been pressed into service, are necessarily the equivalent of the professional soldiers whom they have been directed to assist is doubtful.

The second context in which state courts are called upon to adjudicate federal law concerns cases brought to enforce state law claims in which issues of federal law are raised as a preempting defense. In such situations, unless the state courts are both empowered and required to adjudicate and enforce federal law, the supremacy of federal law would inevitably be substantially undermined. Thus, the fact that state courts are empowered to adjudicate federal law in such circumstances in no way necessarily reflects a positive judgment on the quality, expertise, or ability of state judges in the adjudication of federal law. Rather it merely presumes that a requirement of state court adjudication and interpretation of federal law is essential to maintaining federal supremacy.

This point can best be understood by examination of the Supreme Court’s

119. *Testa v. Katt*, 330 U.S. 386, 389 (1947).

120. *Id.*

decision in *Lear v. Adkins*.¹²¹ The issue in the case was whether a state court could adjudicate a claim of patent invalidity when the claim was made in defense to a state law breach-of-contract claim.¹²² The question was difficult to answer because Congress had rendered jurisdiction in suits brought to enforce the federal patent laws exclusively federal.¹²³ In essence, Congress statutorily deemed the state courts to be incompetent adjudicators of suits arising under the patent laws. However, where an issue of patent law arises as a defense to a state law cause of action, a federal court lacks federal question jurisdiction to hear the suit.¹²⁴ Thus, if a state court's inability to adjudicate issues of federal patent law were to extend to situations in which the patent issues arise in the form of a defense to a state cause of action, the inevitable result, at some point, would be the failure of federal supremacy.

The facts in *Lear* demonstrate this point. The case involved the validity of an issued patent. Adkins had licensed his patent to Lear in exchange for royalties,¹²⁵ and Lear had refused to pay the contracted-for royalties. Adkins brought suit in state court for breach-of-contract, and Lear defended by arguing that he was not obligated to pay the royalties because the patent was invalid. Adkins had filed a simple state law breach-of-contract claim. Lear, however, challenged the patent's validity under the federal patent laws.

The validity of a patent often presents complex issues of federal law. The Supreme Court held that the state court had jurisdiction to decide the patent validity claim, despite the fact that the court would have lacked jurisdiction to adjudicate a suit brought directly to enforce the patent laws.¹²⁶ In so holding, the Court drew a distinction between suits brought to enforce a patent (over which federal courts have exclusive jurisdiction) and suits brought to enforce a contract involving a patent (where the state court is obligated to interpret and enforce federal patent law). As a result of this distinction, *Lear* "caused a decisive shift" in the division of jurisdiction over patent cases between federal and state courts because patent validity became "a potential issue in literally every action brought in state court for breach of a patent license or assignment."¹²⁷

The Supreme Court's decision to authorize state court interpretation of the

121. 395 U.S. 653 (1969).

122. *Id.* at 654.

123. See 28 U.S.C. § 1338(a) (1994).

124. This result flows from the premises of the judge-made "well-pleaded complaint" rule, which points that a case can be deemed to "arise under" federal law for purposes of the general federal question jurisdiction statute, 28 U.S.C. § 1331(a) (1994), only when the federal issue appears on the face of the plaintiff's well-pleaded complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

125. See Donald Shelby Chisum, *The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation*, 46 WASH. L. REV. 633, 645 (1971) ("A license . . . is a contract whereby the owner of the patent (the patentee or an assignee) allows the licensee to make, use, or sell the invention.").

126. *Lear*, 395 U.S. at 675.

127. Chisum, *supra* note 125, at 663.

patent laws under the circumstances in *Lear* effectively illustrates the rationale of necessity that underlies the commandeering power. State courts are authorized to adjudicate federal patent law defenses to state law claims, but not out of federal respect for state judicial abilities to adjudicate the law in that area. Indeed, Congress has, by statute, deemed state courts inherently incompetent to adjudicate federal patent law claims. Rather, state courts are vested with power to adjudicate federal patent law defenses, simply because to deny them such authority would seriously threaten maintaining the supremacy of the federal patent laws.

The existence of the commandeering power, then, derives from an assumption of federal dominance over state courts. This principle of federal dominance leads to recognition of the practical and theoretical needs to have the state courts available in order to serve interests in federal convenience and federal law supremacy maintenance. If state judiciaries were systematically incapable of adjudicating issues of federal law, neither of these results could be achieved. The principle of state-federal court parity, upon which the Supreme Court has based much of its modern jurisprudence of judicial federalism, is—like the commandeering power itself—thought to derive from the indisputable historical fact that since the nation’s inception, the state courts were empowered to interpret and enforce federal law. But careful attention to the assumptions and implications of the commandeering power demonstrates that: (1) the empowerment of the state courts as interpreters of federal law in no way necessarily implies an assumption of state-federal court fungibility as effective interpreters and enforcers of federal law; and (2) such empowerment is designed not out of concern for federal deference to state courts, but rather out of recognition of the need for dominance of the federal government over the state judiciaries.

B. Reconciling the Principle of Federal Dominance With the Anti-Injunction Statute

To this point, we have argued that while the federal power to commandeer state courts necessarily assumes state court ability to adjudicate federal law issues, that assumption reflects not a systemic deference to state judiciaries but rather the dominance of the federal level of government and the corresponding subordination of the state judiciaries within the federal system. An examination of related historical practice tends to confirm this conclusion.

One might argue that the very existence of the Anti-Injunction Statute¹²⁸ since early in the nation’s history contradicts our conclusion of the subordination of the state judiciaries. A form of the Anti-Injunction Statute appeared originally in section 5 of the Judiciary Act of March 2, 1793.¹²⁹ It provided that “the writ of injunction shall not be granted by any court of the United States to stay

128. 28 U.S.C. § 2283 (1994).

129. An Act to Establish the Judicial Courts of the United States § 5, 1 Stat. 335 (1845) (obsolete).

proceedings in any court of a State.”¹³⁰ The Supreme Court has relied on the Anti-Injunction Statute as proof of a “longstanding public policy” to have state courts work free from federal court interference.¹³¹ It thus might appear that the Anti-Injunction Statute reflects a background understanding of judicial federalism that runs counter to the view that state courts are subordinate to the federal government.

Closer examination, however, reveals that the existence of the Anti-Injunction Statute does little to undermine the historical foundations of federal dominance within the structure of judicial federalism. First, in enacting the Anti-Injunction Statute, Congress left untouched federal court power to employ non-injunctive means to effect stays of state court actions. At the time Congress enacted the Anti-Injunction Statute, federal courts employed common-law writs of certiorari, supersedas, habeas corpus, and prohibition to interfere with state court actions.¹³² Thus, even after enactment of the Anti-Injunction Statute, federal courts retained authority to disrupt state court proceedings. Second, the very same Judiciary Act which included the Anti-Injunction Statute also authorized removal to federal court of specified diversity cases.¹³³ Moreover, in certain instances removal statutes provided litigants with an option to disrupt an ongoing state court proceeding, by transferring venues to a federal court.¹³⁴ The removal statute expressly provided that when a case is removed, “it shall then be the duty of the state court to . . . proceed no farther with the cause.”¹³⁵

Finally, the dearth of substantive federal statutes enacted at the time the Anti-Injunction Statute was adopted seriously dilutes any argument that the statute’s existence was intended to reflect federal deference to state judicial ability to adjudicate issues of substantive federal law. Since few federal statutes existed at the time of the statute’s initial enactment, state courts at that time would rarely have been called upon to interpret substantive federal law. Thus, enactment of the Anti-Injunction Statute did not necessarily signal federal respect for state judicial autonomy. It is quite probably no coincidence that exceptions to the Anti-Injunction Statute developed when the amount of substantive federal law

130. *Id.* See generally Redish & Muench, *supra* note 21, at 311-36.

131. *Younger v. Harris*, 401 U.S. 37, 43 (1971). See also *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (“Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings ‘should normally be allowed to continue unimpaired by intervention of the lower federal courts.’”) (quoting *Atlantic Coast Line R.R. v. Locomotive Eng’rs*, 398 U.S. 281, 287 (1970)).

132. See Note, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Intent*, 38 U. CHI. L. REV. 612 (1971); see also William Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 336 (1978).

133. Judiciary Act of 1789, § 12, 1 Stat. 79. See also Note, *supra* note 132, at 615.

134. See TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, *supra* note 117, at 346 n.76 (“If state and federal courts were historically considered fungible, one may wonder why, since the relatively early days of the nation’s history, Congress has found it necessary to allow federal officers to remove to federal court suits brought against them in state court.”).

135. Judiciary Act of 1789, § 12, 1 Stat. 79.

expanded.¹³⁶ For example, the first judicially-created exception to the Anti-Injunction Statute occurred in 1875,¹³⁷ the same year in which Congress enacted the first general federal question statute.¹³⁸ Thus, the Anti-Injunction Statute was probably not about limiting federal interference with state courts in state court interpretation of federal law. Instead, the Anti-Injunction Statute at most represented concern for federal court interference with state court interpretation of *state* law, the subject matter of the majority of cases in which the statute's bar would have come into play at the time of the statute's enactment. Hence, the original enactment of the Anti-Injunction Statute does not inherently undermine the framework of federal dominance which we have inferred from the existence of the commandeering principle.¹³⁹

*C. Implications of the Federal Dominance Principle for the
Doctrine of "Our Federalism"*

Just as state courts are obligated to adjudicate possible preempting patent law defenses in state breach-of-contract actions,¹⁴⁰ so too, are they obligated to adjudicate claims of preempting federal constitutional defenses that may be raised in the course of state criminal prosecutions. In such contexts, the Supreme Court established an all-but-total principle of federal judicial deference to state court adjudication of such federal defenses under the heading of "Our Federalism" in its well known and controversial decision in *Younger v. Harris*.¹⁴¹

In *Younger*, Harris had been indicted in a California state court for violating the California Penal Code. In response, Harris asked a federal district court to enjoin the Los Angeles District Attorney from prosecuting Harris because any such prosecution would violate certain constitutional rights. The district court agreed to enjoin the prosecution, but the Supreme Court reversed.¹⁴² The Court

136. Moreover, a "double standard" developed because state court prohibitions on enjoining federal courts remained exception free while the prohibition on federal court enjoinder of state courts loosened. See Note, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 472 (1965).

137. *French v. Hay*, 89 U.S. 250 (1874).

138. Judiciary Act of 1875, 18 Stat. 470.

139. For an additional argument that supports a construction of the Anti-Injunction Statute in a manner consistent with a pro-federal understanding of judicial federalism, see Mayton, *supra* note 132. Professor Mayton construes the plain language of the Anti-Injunction Statute to mean something radically different than a prohibition of federal court injunctions against state court proceedings. Professor Mayton has argued that the Anti-Injunction Statute only prohibits a single Justice of the Supreme Court from interfering with state court proceedings while riding circuit. *Id.* at 332.

140. See, e.g., *Lear v. Adkins*, 395 U.S. 653 (1969).

141. 401 U.S. 37 (1971).

142. *Younger*'s companion case also prohibited federal court declaratory judgments against a pending state criminal prosecution. *Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

held that, except in extremely rare circumstances,¹⁴³ the judge-made doctrine of "Our Federalism" prohibited a federal court from enjoining an ongoing state criminal prosecution.¹⁴⁴

This is not the place to rehearse all of the normative and institutional arguments either for or against *Younger* abstention—issues which have already been the subject of considerable scholarly debate.¹⁴⁵ Our concern with *Younger*, for present purposes, is exclusively with the assumptions inherent in the doctrine of judicial federalism adopted in that decision and its progeny concerning the role of state courts as adjudicators of federal law. At least in part, the deference dictated in *Younger* flowed from recognition of the need to avoid the "unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution [sic] of the United States.'"¹⁴⁶

Inherently intertwined with the *Younger* Court's concern that permitting a federal injunction of a state criminal prosecution would necessarily cast unwarranted aspersions on the ability of state judges to interpret and enforce federal law was the *Younger* Court's focus on principles of equity. A fundamental precept of equity jurisprudence is that equity will not act when an adequate remedy at law exists.¹⁴⁷ Because state courts are historically deemed fully competent to adjudicate issues of federal law, the Court reasoned that this precept of equity precludes federal injunction of a state court criminal proceeding: A litigant has a full opportunity to obtain equivalent adjudication and protection of his federal rights in the course of the existing state court adjudication.¹⁴⁸

143. The Court held that the bar to federal injunctive relief did not apply where the prosecution had been brought in bad faith, as part of a plan of harassment, or to enforce a patently unconstitutional law. *Younger*, 401 U.S. at 47-49. In addition, the doctrine will be inapplicable if the state judicial forum is somehow inherently incapable of providing an adequate forum. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973).

144. *Younger*, 401 U.S. at 44-49. In subsequent decisions, the Court extended the bar of "Our Federalism" to certain state civil actions. See, e.g., *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

145. One of us has previously criticized the *Younger* doctrine, on grounds of both separation of powers and federalism policy. See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of Judicial Function*, 94 YALE L.J. 71 (1984) [hereinafter *Limits of Judicial Function*]; Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978).

146. *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)). See also *Huffman*, 420 U.S. at 604. For expression of a similar view prior to *Younger*, see Justice Harlan's dissenting opinion in *Dombrowski v. Pfister*, 380 U.S. 479, 499 (1965) (Harlan, J., dissenting), criticizing the majority for making the "unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively."

147. See *Younger*, 401 U.S. at 43-44.

148. *Id.* But see Anthony J. Dennis, *The Illegitimate Founds of the Younger Abstention*

As our review of the commandeering principle demonstrates, in its *Younger* line of decisions the Court has completely misunderstood the proper implications to be drawn from the recognition of the state courts' ability to construe federal law. The fact that the framers vested state courts with authority to interpret and enforce federal law does not necessarily imply solicitousness for state judges or necessarily reflect the belief that state courts are the equal of the federal courts as interpreters of federal law. Rather, state courts have been vested with such authority in order to ensure federal supremacy and facilitate the enforcement of federal law. Thus, the fact that state courts are, as a technical matter, competent to adjudicate federal constitutional defenses in the course of a state criminal prosecution in no way necessarily implies an assumption of state court equivalence with the federal courts as interpreters of federal law any more than the decision in *Lear* necessarily implied an assumption of state-federal court equivalence as interpreters of federal patent law. Thus, a federal court's decision to enjoin a state criminal prosecution, thereby preempting the state court's opportunity to resolve issues raised by federal constitutional defenses, should not be precluded simply because the state court is technically competent to adjudicate the federal issues.¹⁴⁹

D. Implications of the Federal Dominance Principle for State Court Use of Federal Procedures

The existence of the commandeering power, we have argued, grows out of a theory of judicial federalism that reflects the dominance of federal power and the utilization of state courts to facilitate attainment of substantive and administrative federal goals. Once one reaches this conclusion, a natural question that arises concerns the extent to which state courts, in adjudicating federal claims, should be required to employ federal procedures. The Court has given relatively little attention to this question, a puzzling circumstance in light of the potentially enormous impact that the choice of procedure will often have on the implementation of substantive legal directives.¹⁵⁰

Likely to exacerbate the problem, and thus render even more pressing the need to obtain more carefully reasoned guidance from the Supreme Court, is the

Doctrine, 10 U. BRIDGEPORT L. REV. 311, 326 (1990) ("This history indicates that equitable doctrines have never addressed such systemic factors as federalism and comity. At most, courts sitting in equity addressed inter-judicial or inter-governmental tensions only inadvertently through the resolution of individual disputes.").

149. We should emphasize that our conclusion does not necessarily lead to a rejection of *Younger* abstention. It is arguable that the deference dictated by *Younger* could be justified by other considerations, such as concern for state legislative and executive discretion and autonomy. But see *Limits of Judicial Function*, *supra* note 145, at 84-90.

150. See, e.g., *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

Court's recent decision in *Seminole Tribe of Florida v. Florida*.¹⁵¹ There the Court severely limited Congress' power to abrogate state sovereign immunity. As a result of *Seminole Tribe*, private party suits against state governments brought under federal law abrogating state sovereign immunity (unless enacted pursuant to the Enforcement Clause of the Fourteenth Amendment¹⁵²) cannot be brought in federal courts.¹⁵³ Since *Seminole Tribe* closed the doors of the federal courts in most suits brought against state governments, even to enforce federal statutory rights, it seems reasonable to expect a substantial increase in the number of federal question-based actions brought in state court. In such cases, the extent to which state courts are required to employ federal procedures may have a significant impact on the efficiency and effectiveness of the state court enforcement of substantive federal rights.

1. *Choosing Between State and Federal Procedures*.—Cases presenting the question of the extent to which state courts are bound to employ federal procedures in the enforcement of substantive federal rights and claims have, at various times, been described as either “converse *Erie*”¹⁵⁴ or “reverse *Erie*” decisions. Such cases present the mirror-image of the situation involved in the Court's famed decision in *Erie Railroad Co. v. Tompkins*.¹⁵⁵ In *Erie*, the Court held that federal courts applying state law must apply the substantive law of the forum state.¹⁵⁶ In subsequent decisions, the Court considered the extent to which a federal court sitting in diversity must, in addition to enforcing state substantive law, also employ state procedures.¹⁵⁷ In contrast to the *Erie* line of cases, converse-*Erie* decisions deal with state court enforcement of substantive federal law.

Conceptually, two groups of converse-*Erie* situations are conceivable. One group consists of situations in which federal law explicitly demands that state courts adopt particular procedures when hearing a federal right. The other cluster of converse-*Erie* cases addresses federal law that is silent as to which procedures state courts should adopt when hearing a case based on a federal right. In the former situation, assuming that commandeering of state courts falls

151. 517 U.S. 44 (1996).

152. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

153. See Andrew I. Gavil, *Interdisciplinary Aspects of Seminole Tribe v. Florida: State Sovereign Immunity in the Context of Antitrust, Bankruptcy, Civil Rights and Environmental Law*, 23 OHIO N.U. L. REV. 1393, 1398 (1997) (“Rather than serving as a source of State insulation from federal authority, therefore, [*Seminole Tribe*] is emerging as a somewhat perverse, inverted “Bill of Rights,” which minimizes the degree to which states can be held answerable to their own citizens.”).

154. See generally Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1961).

155. 304 U.S. 64 (1938).

156. *Id.* at 78.

157. See, e.g., *Brown v. Western Ry.*, 338 U.S. 294 (1949); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952).

within congressional power (whether via the Necessary and Proper Clause or the State Judges Clause), the implication is all but inescapable that state courts would have to employ federal procedures when expressly mandated by federal statute. To do otherwise would allow state procedural rules to trump conflicting federal statutes, and the lesson of *Testa* is that under the Supremacy Clause state courts cannot ignore validly enacted federal law.¹⁵⁸

The more difficult question is, assuming the existence of the commandeering power, to what extent (if at all) should state courts be required to abandon their own procedural rules in favor of conflicting federal procedures when adjudicating federal claims where Congress remains silent on the issue. A careful review of the Court's converse-*Erie* cases reveals no clear answer to this question.¹⁵⁹

In determining whether state courts must employ federal procedures in adjudicating federal claims, the Supreme Court has available several conceivable options. First, the Court could hold that in the absence of an express congressional directive to the contrary, a state court is always free to employ its own procedural rules when adjudicating any issue of federal law. Second, the Court could adopt a balancing test. Under such an approach, a state forum would be required to employ a particular federal procedure when and only when it is found that the extent of disruption caused to the state judicial system by the need to alter selectively its own procedural structure is outbalanced by the degree of interference with attainment of the substantive goal embodied in the governing federal law that would result from the state court's failure to employ the federal procedure in question. A pro-federal variation on this broad, ad hoc balancing analysis would ask whether the federal procedure in question was somehow "bound up" with the substantive federal law being enforced, in other words, the extent to which use of the federal procedure was essential to achieve the substantive federal goal.¹⁶⁰ If the federal procedure is, in fact, tied to achievement of the substantive federal goal in this manner, the state court would be required to employ the procedure, regardless of the resulting burdens on the state judicial system. Finally, the Court could adopt a variation of this pro-federal model. Under this standard, state courts must always employ federal procedures in enforcement of a substantive federal cause of action, at least absent the resulting need for a significant restructuring of the state judicial system in order to accommodate the federal procedures.

At various times, the Supreme Court appears to have chosen among these different models in order to resolve the converse-*Erie* question, albeit without expressly recognizing those differences. In its initial converse-*Erie* decision,

158. *Testa v. Katt*, 330 U.S. 386 (1947).

159. See, e.g., *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916); *Central Ry. Co. v. White*, 238 U.S. 507 (1915).

160. The "bound up" language is drawn from the Supreme Court's direct *Erie* case, *Byrd v. Blue Ridge Rural Electrical Coop.*, 356 U.S. 525 (1958). See Redish & Phillips, *supra* note 150, at 365.

Central Vermont Railway Co. v. White,¹⁶¹ the Court forbade state courts in a Federal Employers' Liability Act ("FELA")¹⁶² action from applying a state rule that required plaintiffs to prove the absence of contributory negligence. The Court found that Congress had intended the FELA to require the defendant to prove contributory negligence and that the state rule at issue constituted a conflicting substantive rule, not a "mere matter of state procedure."¹⁶³ However, the Court indicated that had the state rule at issue been a mere matter of procedure, "the state court can, in those and similar instances, follow their own practice in the trial of suits arising under the Federal law."¹⁶⁴ *White* thus appears to establish, albeit solely in the form of dictum, an irrebuttable presumption in favor of allowing state courts to employ their own procedural rules in the adjudication of federal claims when Congress is silent as to which procedures are to be used.

In contrast to *White*, the Court, in its subsequent decision in *Dice v. Akron, Canton & Youngstown Railroad Co.*¹⁶⁵ seemingly adopted, albeit in a most cryptic fashion, some form of systemic balancing approach to the converse-*Erie* question. In *Dice*, a plaintiff filed an action in state court against his employer under FELA. The defendant argued that the plaintiff had signed an agreement releasing the defendant from liability. The plaintiff responded that his release had been obtained as the result of fraud. The Supreme Court initially held that the validity of the release agreement was an issue of federal law. Applying state law to determine the validity of a release agreement, the Court reasoned, would "defeat[]" federal rights, undermine uniformity necessary to effectuate the purposes of FELA, and be "incongruous" with the general policy of FELA.¹⁶⁶

In addition to the choice-of-law issue concerning the substantive question of the release's validity, the Supreme Court had to decide whether the state court was required to employ the federal practice of using a jury to decide the fraud issues. The Ohio state court applied state law that assigned the factual issues concerning the fraudulent nature of the release to the judge, rather than to the jury. The defendants argued that in light of the decision in *Minneapolis & St.*

161. 238 U.S. 507 (1915).

162. 45 U.S.C. §§ 51-60 (1994).

163. *Central Vermont Ry. Co.*, 238 U.S. at 512.

164. *Id.*

There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice in the trial of suits arising under the Federal law.

Id. (citations omitted).

165. 342 U.S. 359 (1952).

166. *Id.* at 361-62.

Louis Railroad v. Bombolis,¹⁶⁷ where the Court had refused to impose on state courts in FELA actions the Seventh Amendment's unanimous verdict obligations,¹⁶⁸ states may eliminate the use of the jury for the phase of the case that determines if the release had been fraudulently obtained.¹⁶⁹ The Court rejected this argument because the right to a jury trial is "too substantial" a part of the FELA's rights, and "part and parcel" of the FELA remedy, as to be classified as a purely procedural rule.¹⁷⁰ Though the Court did not elaborate, presumably the federal interest in having resolution by a jury flowed from the widespread assumption that juries are, as a general matter, likely to favor individual plaintiffs over large corporate defendants in negligence actions, combined with the statute's obviously pro-plaintiff tenor.¹⁷¹

167. 241 U.S. 211 (1916).

168. U.S. CONST. amend. VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id. The Seventh Amendment orders a trial by jury "according to the rules of the common law." Those rules include a unanimous verdict requirement. See *American Pub. Co. v. Fisher*, 166 U.S. 464, 467-68 (1897).

169. The Minnesota statute in *Bombolis* allowed a civil verdict by five-sixths of the jury if, after twelve hours, the jury could not reach an unanimous verdict. *Bombolis*, 241 U.S. at 216. For companion cases involving similar statutes, see *St. Louis & San Francisco Railroad v. Brown*, 241 U.S. 223 (1916) (three-fourths verdicts); *Louisville & Nashville Railroad v. Stewart*, 241 U.S. 261 (1916) (three-fourths verdict); *Chesapeake & Ohio Railway v. Carnahan*, 241 U.S. 241 (1916) (jury of seven).

170. *Dice*, 342 U.S. at 363. Justice Frankfurter concurred separately, arguing that the majority had improperly found the state procedure bound up and preempted by the federal law. *Id.* at 364 (Frankfurter, J., concurring). According to Justice Frankfurter, *Bombolis* meant that a state court decision to have no jury in all negligence actions is not inconsistent with FELA because "certainly [FELA] does not require" state courts to have juries for negligence actions brought under the statute. *Id.* at 367. Moreover, if a state kept the traditional division of courts between common law and equity, "there is nothing in" FELA that requires states to abandon this distribution of authority. *Id.* State courts were "not trying to evade their duty under [FELA]." *Id.* at 368. In short, Justice Frankfurter felt that the Court was making an error in statutory construction. He wrote:

The fact that Congress authorized actions under the [FELA] to be brought in State as well as in Federal courts seems a strange basis for *the inference that Congress overrode State procedural arrangements* controlling all other negligence suits in a State, by imposing upon State courts to which plaintiffs choose to go the rules prevailing in the Federal courts regarding juries.

Id. (emphasis added).

171. For example, FELA granted to plaintiffs the irrebuttable option to choose the forum by denying to defendants the choice of removal where plaintiff chose to sue in the state forum. 28 U.S.C. § 1445(a) (Supp. II 1996).

The *Dice* Court, however, prefaced its rejection of the state court's elimination of a jury trial for the fraud phase of the case by cryptically stating that "[t]he *Bombolis* case might be more in point had [the state] abolished trial by jury in all negligence cases including those arising under [FELA]."¹⁷² The Court seems to have been suggesting that had the state totally abandoned the use of jury trials in negligence cases, it might have been allowed to employ the judge in resolving the fraud issue, despite the strong federal interest in employing jury trials in the adjudication of FELA actions.

Because the Court in *Dice* appeared to speak almost in its own shorthand, however, it is difficult to glean from the decision a clear guide for the resolution of future cases. Professor Michael Collins has argued that *Dice* "indicated the Court's reluctance to impose entirely new structures on the states for the disposition of federal claims for relief. . . . It also suggests that . . . federal power to displace state procedure may not be limitless."¹⁷³ Professor Collins concluded that, under *Dice*, the Court's rule of thumb in converse-*Erie* cases is to find state procedural rules trumped only upon "a clear congressional statement to that effect."¹⁷⁴ Justice O'Connor has in recent years adopted this view, writing in dissent that "absent specific direction from Congress . . . state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights."¹⁷⁵

While the Court could conceivably choose such a deferential standard, it is all but impossible to construe the *Dice* opinion to have in fact adopted such a view. At no point in the text of the FELA did Congress expressly directed the state courts to employ the federal practice of directing juries to decide factual issues of fraud in obtaining releases. Under Professor Collins' standard, then, presumably the Court in *Dice* should have allowed the state court to follow its own practice of having the judge decide such issues. This conclusion, of course, is directly contrary to the result actually reached in *Dice*. Instead, the *Dice* Court's conclusion appears to have anticipated the type of systemic balancing test subsequently adopted by the Court for *Erie* cases in *Byrd v. Blue Ridge Rural Electrical Coop.*,¹⁷⁶ under which the forum's interest in employing its own procedures is balanced against the interest of the source of the substantive law in assuring that uniform policy goals are attained.¹⁷⁷

The most significant problem with such a balancing analysis, however, is its inherent unpredictability. It is simply impossible to avoid the subjectivity and vagueness inherent in the weighing of competing concerns that are wholly

172. *Dice*, 342 U.S. at 363.

173. Collins, *supra* note 20, at 183; *see also* Caminker, *supra* note 70, at 1030 ("Congress's power to conscript other branches does not entail the power to require fundamental restructuring of the state's administrative machinery.").

174. Collins, *supra* note 20, at 184 n.405.

175. *Southland Corp. v. Keating*, 465 U.S. 1, 31 (1984) (O'Connor, J., dissenting).

176. 356 U.S. 525 (1958).

177. *See* Redish & Phillips, *supra* note 150, at 362-66.

unquantifiable.¹⁷⁸ Problems caused by the unpredictability inherent in this ad hoc balancing analysis substantially increase when one realizes the extremely limited opportunity for federal intervention in the converse-*Erie* decision-making process. This is due to the fact that, for the most part, the decision whether a state court is obligated to employ particular federal procedures in the enforcement of a federal claim will be made exclusively by the state courts themselves. Because the lower federal courts have no opportunity to review the decisions of state courts in civil actions,¹⁷⁹ the only opportunity for federal review of the state courts' decisions will come through review in the Supreme Court which provides, at best, a highly speculative means of assuring state court compliance with supreme federal interests.

Of course, if one were to proceed under an assumption of state and federal court "parity," there logically should be no problem with placing such heavy reliance on the state courts to act as the virtual guarantors of the protection of federal interests. However, as we have shown, the fact that state courts are deemed technically competent to adjudicate federal law reflects not an assumption of parity, but rather merely a recognition of the practical necessity of the need both to spread the federal adjudicatory burden and to preserve federal supremacy. Because the existence of the commandeering power reflects the principle of federal dominance within the structure of judicial federalism, state courts should not be given wide-ranging and effectively unreviewable discretion to ignore federal procedures that might prove to be important to attaining and preserving federal substantive goals.

This reasoning logically leads to a preference for a standard which would contain considerably less discretionary flexibility than an ad hoc balancing analysis would permit when a state court makes such a determination. Rather, these considerations call for a standard that will assure the attainment of federal supremacy in the enforcement and protection of federal claims. Such a standard would dictate a strong presumption in favor of the use of federal procedures when a state court is called upon to adjudicate a federal cause of action.¹⁸⁰

178. See CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 403 (5th ed. 1994) ("The [Byrd] opinion exhibits a confusion that exceeds even that normally surrounding a balancing test, as lower courts understandably experienced considerable difficulty in applying it."). See also John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 709 (1974).

179. See TENSIONS IN THE ALLOCATION OF JUDICIAL POWER, *supra* note 117, at 309. ("With only a minimum of exceptions . . . any federal policing of the state courts must come on direct review by the Supreme Court; the lower federal courts do not sit in collateral judgment over the rulings of state courts.").

180. While this conclusion should prevail when the state court is called upon to adjudicate a federal cause of action, it is arguable that the burden imposed on the state court to employ federal procedures should not be as unrelenting when the federal issue arises in the course of the adjudication of a state cause of action. In such cases, the state possesses a competing and countervailing interest in achieving enforcement of its own substantive policies through use of its own procedures. To be sure, in light of the principle of federal dominance, where Congress expressly directs state courts to adhere to federal procedures where issues of federal law arise or

At no point has the Supreme Court ever adopted so sweepingly protective a converse-*Erie* standard as the one we advocate.¹⁸¹ On occasion, however, the Court has focused intently on the importance of certain procedural rules to the effective enforcement of federal substantive law. One example is in *Brown v. Western Railway of Alabama*.¹⁸² The plaintiff in *Brown* filed a FELA action in state court. The state court dismissed the complaint under a state pleading requirement that construed allegations “most strongly against the pleader.”¹⁸³ The Supreme Court reversed, stating:

Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. “Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.¹⁸⁴

Brown demonstrates that at least on occasion the Supreme Court is willing to effectuate the federal power to commandeer state courts by finding certain

where use of state procedures could seriously disrupt proper enforcement of substantive federal law, federal procedures should necessarily prevail. However, absent one or both of these circumstances, it would seem reasonable to allow a state court to employ its own procedures in the adjudication of its own causes of action.

181. Indeed, in its most recent statement on the converse-*Erie* issue, the Court appears actually to have retracted somewhat from a pro-federal balancing analysis. See *Johnson v. Fankell*, 117 S. Ct. 1800 (1997). The Court in *Johnson* held that the State did not have to follow the federal practice of allowing interlocutory appeals of orders denying qualified officer immunity in 42 U.S.C. § 1983 (Supp. II 1996)) civil rights actions (an exception recognized by federal courts to the rule that only final judgments may be appealed). The Court distinguished *Dice*, because there the Court:

[had] made clear that Congress had provided in FELA that the jury trial procedure was to be part of claims brought under the Act. In [*Johnson*], by contrast, Congress has mentioned nothing about interlocutory appeals in § 1983; rather, the right to an immediate appeal in the federal court system is found in § 1291, which obviously has no application to state courts.

Id. at 1806 n.12. However, neither the text nor history of 28 U.S.C. § 1291 (1994), embodying the final judgment rule, in any way provides the basis for an exception for appeal of claims of qualified immunity. Rather, it was the substantive policy against subjecting federal offices to unjustified suit that had originally led the Court to recognize this exception to the final judgment rule. See generally *Mitchell v. Forsyth*, 472 U.S. 526 (1985). Thus, the Court’s decision in *Johnson* enabled a state court to avoid use of a procedure established solely to facilitate protection of a substantive federal right.

182. 338 U.S. 294 (1949).

183. *Id.* at 295.

184. *Id.* at 298-99 (quoting *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)).

state procedural rules preempted in the context of state court adjudications of a federal cause of action. The FELA, which was the statute at issue in *Brown*, was silent concerning the need to use federal procedures. Despite this congressional silence, the Court refused to provide state courts with a blank check to employ their own procedural rules in federal causes of action. Instead, the Court considered the policy repercussions that would arise from adherence to state procedural rules and found that if the state procedures “defeated” the assertion of federal rights, applicable federal procedures had to be utilized. *Brown* effectively constitutes a preemption case, where the Court read the FELA to preempt all state procedural rules that defeated the purpose of the statute.¹⁸⁵

The Supreme Court employed a similar analysis in its subsequent decision in *Felder v. Casey*.¹⁸⁶ At issue in *Felder* was the application of 42 U.S.C. § 1983,¹⁸⁷ the basic federal civil rights cause of action, to a Wisconsin notice-of-claim statute that required a plaintiff wishing to sue a governmental defendant to notify that defendant about certain matters concerning the suit and, once notice had been provided, not to file suit for 120 days.¹⁸⁸ Under Wisconsin law, failure to comply with the notice-of-claim statute constituted grounds for dismissal. The Court reaffirmed the “general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts,” but also emphasized that a local practice cannot be employed to defeat a federal right.¹⁸⁹ The Court held that the Wisconsin statute was preempted for two reasons.¹⁹⁰ First, the statute conflicted with the purpose and effects of the remedial objectives of § 1983.¹⁹¹ Second, the Wisconsin statute is outcome-determinative, that is, it ensures different outcomes in § 1983 litigation based solely upon the court in which the claim is asserted.¹⁹²

185. Construing *Brown* as a preemption case comports with the Court’s preemption jurisprudence, which finds state law preempted if it undermines achievement of the goals of a federal statute. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that a state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

186. 487 U.S. 131 (1988).

187. 42 U.S.C. § 1983 (Supp. II 1996).

188. *Felder*, 487 U.S. at 134.

189. *Id.* at 138.

190. *Id.*

191. *Id.*

192. *Id.* Building on this last point, Justice Brennan’s cogently explored the downside of dual federalism, the downside that *Printz v. United States*, 117 S. Ct. 2365 (1997), ignored. Brennan stated,

[T]he very notions of federalism upon which respondents rely dictate that the State outcome-determinative law must give way when a party asserts a federal right in state court [T]he Supremacy Clause imposes on state courts a constitutional duty ‘to proceed in such [a] manner that all the substantial rights of the parties under controlling federal law [are] protected.’

Felder, 487 U.S. at 151 (quoting *Garrett v. Moore-McCormack*, 317 U.S. 239, 245 (1942)).

The decisions in both *Brown* and *Felder* reflect a high degree of care and effort to prevent state court use of procedural rules that would hinder effectuation of the substantive policies embodied in federal law. However, the inherently limited availability of Supreme Court policing of the state courts' procedural choices in converse-*Erie* contexts renders dubious the success of the *Brown* and *Felder* case-by-case mode of analysis in the continued assurance of federal supremacy. The Supreme Court is, as a practical matter, simply unable to review a sufficient number of state court decisions to make any case-by-case analysis fully protective of federal interests. Instead, the Supreme Court, by directing the state courts to employ federal procedures when adjudicating a federal claim unless to do so would require a significant attenuation in the structure of the state judicial system would simultaneously reduce the state courts' case-by-case discretion and facilitate Supreme Court policing of state court decisions on the issue.

2. *Applying Converse-Erie Principles to the Tobacco Settlement.*—The issues raised by the converse-*Erie* doctrine could conceivably play an important role in deciding the constitutionality of tobacco settlement legislation, if and when such legislation were ever adopted. The tobacco industry, in exchange for acceptance of strict advertising limits and the payment of substantial sums of money, agreed to settle the states Attorneys General actions against the industry for Medicaid reimbursement, as long as Congress provided three forms of legal protection to the industry: (1) immunity from punitive damages in civil lawsuits regarding past industry misconduct; (2) prohibition of certain types of multi-party actions; and (3) caps on annual pay-outs for lost suits.¹⁹³ While more recent political developments make congressional approval of the settlement unlikely and appear to have rendered the constitutional issues surrounding such legislation largely academic, the questions surrounding Congress' constitutional power to prohibit multi-party actions against the tobacco industry remain worthy of intellectual analysis.

One problem facing Congress in enacting these legal protections is that both the source of the substantive law and the judicial forums are likely to be state, rather than federal law. Thus, were Congress to enact a law prohibiting multi-party product liability actions in state court against tobacco manufacturers, Congress would in effect direct state courts to employ specific procedures in

193. See Jeffrey Taylor, *Bipartisan Bill Over Tobacco is in the Works*, WALL ST. J., Feb. 27, 1998, at A3. Companies will remain subject to criminal charges. Senators Tom Harkin (D-Iowa), Bob Graham (D-Fla.), and John Chafee (R-R.I.) have proposed a bill that grants tobacco companies only an \$8 billion cap on the amount of damages annually paid—but provides no immunity from class-action suits. Representative Vic Fazio (D-Cal.) and Senator Kent Conrad (D-N.D.) each went one step further, proposing bills that provide no future legal relief to the tobacco industry. See Jeffrey Taylor, *White House Backs Tobacco Bill With No Legal Relief for Industry*, WALL ST. J., March 12, 1998, at A4. On April 1, 1998, the Senate Commerce Committee approved a tobacco bill that gave the tobacco industry only one form of litigation relief: a \$6.5 billion cap on annual pay outs. See Joseph Nocera, *Don't Snuff Out Big Tobacco: Why Revenge is Bad Public Policy*, FORTUNE, Apr. 27, 1998, at 35.

enforcing their own substantive tort law in their own courts. Whether one views the issue from the perspective of congressional power under Article I or from that of the Tenth Amendment protection of states' rights, it is by no means clear that Congress possesses the constitutional authority to impose such restrictions.

In order to avoid this problem of constitutional federalism, some of the proposed congressional tobacco legislation sought to employ a carrot approach, rather than a stick approach. For example, Senator McCain's bill, presumably relying on the waiver structure approved by the Supreme Court in *South Dakota v. Dole*,¹⁹⁴ provided that only those states which enact laws restricting multi-party adjudication of tobacco suits qualify for the newly created fund of tobacco money, to be made available as a result of projected payments from the industry.¹⁹⁵ However, this provision, standing alone, would undoubtedly fail to satisfy the tobacco industry, since there would always exist the possibility that a state would choose not to participate in the fund so that it can continue to permit multi-party actions against tobacco manufacturers. Indeed, the linchpin of all of the hotly debated tobacco settlements currently before Congress is the limitation of the industry's exposure to unpredictable levels of liability.¹⁹⁶ Thus, the bill further provided that any state which does not enact such a prohibition on multi-party products liability actions will have its substantive tobacco product liability law preempted. While there seems to be no doubt that Congress has the power under the Commerce Clause to preempt substantive state tobacco law, forcing states to choose between federal preemption or abandonment of multi-party actions arguably contradicts the Supreme Court's decision in *New York v. United States*,¹⁹⁷ which held that Congress may not constitutionally coerce enactment of state legislation.¹⁹⁸

An alternative, arguably more acceptable approach might be for Congress to enact a federal statute which preempts all previously existing state tort law. For example, Congress could simultaneously incorporate each state's preexisting tobacco product liability law by reference¹⁹⁹ and order that, in enforcing what would at that point possess the status of substantive federal tort law, state courts

194. 483 U.S. 203 (1987) (rejecting a challenge to a federal statute that conditioned receipt of federal highway funds for states that permitted persons under the age of twenty-one to buy liquor, on the grounds that Congress has power to condition receipt of state benefits on a state's agreement to waive constitutional protection).

195. S. 1415, 105th Cong., 2d Sess. § 611 (1998) ("To be eligible to receive payments . . . a State . . . shall enter into consent decrees under this section . . . [which] shall contain . . . provisions relating to . . . the dismissal of pending litigation as required under Title VII.").

196. See William Neikirk, *Stalled Deal over Tobacco has Congress in a Quandary*, CHI. TRIB., March 12, 1998, at 15 ("Democrats also have accused Republican leaders of dragging their feet on the [tobacco] legislation. . . . The chief issue: Should the tobacco companies be granted protection from lawsuits, even limited annual 'caps,' in litigation?").

197. 505 U.S. 144, 166 (1992).

198. *Id.* at 175-76.

199. Cf. *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900) (providing an example of congressional legislation which incorporates substantive state law principles by reference).

could not hear multi-party actions.

So revised, the issue becomes one of implicating the converse-*Erie* doctrine. Since this alternative form of tobacco legislation expressly commandeers state courts, those courts would be bound by this valid federal law. If Congress were to conscript state courts in this manner, then surely Congress would possess the constitutional authority to direct that in adjudicating what would now be substantive federal claims, the state courts are not permitted to hear multi-party actions. The principle of federal dominance out of which the federal commandeering power flows would necessarily extend to include the power to direct the choice of procedures to be employed in the adjudication of substantive federal law.

CONCLUSION

The Court in *Printz v. United States*²⁰⁰ was correct in concluding that the Constitution authorizes federal power to commandeer state courts. While the *Printz* Court constitutionally grounded this power in the State Judges Clause, we believe that the power is more appropriately derived from the Necessary and Proper Clause, when read in conjunction with Congress' enumerated powers. Regardless of where the commandeering power is properly grounded, however, its very existence establishes that the original rationale for the state court power to adjudicate federal rights was to spread federal burdens onto state courts and to prevent the destruction of federal law. This commandeering authority establishes that state courts are empowered to decide federal rights as a matter of necessity, and not because of federal deference to the abilities of state judges.

While the Court has properly recognized the existence of the commandeering power, it has largely ignored the implications for the theory of judicial federalism that necessarily flow from recognition of this authority. Once the Court recognizes that the existence of the commandeering power originates in federal dominance over state judiciaries, the many Supreme Court jurisdictional doctrines premised on notions of deference to the state courts based on the notion of state-federal court parity should be totally rejected.

200. 117 S. Ct. 2365 (1997).

PRINTZ AND TESTA: THE INFRASTRUCTURE OF FEDERAL SUPREMACY

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Professor Martin Redish and Steven Sklaver make an elegant argument that state courts are competent to adjudicate federal claims not because they are in “parity” with federal courts but because of the necessities of enforcing supreme federal law.¹ I find much to agree with in this argument. They argue that the Supremacy Clause² should not be understood to distinguish between the obligations of state court judges and state executive officers, contrary to the Supreme Court’s reasoning in both *New York v. United States*³ and *Printz v. United States*;⁴ the reason state courts can be “commandeered” is not because of references to state “Judges” in the Supremacy Clause but rather because of grants of power to Congress, notably in Article I (and including the Necessary and Proper Clause).⁵ Thus, they argue, state courts must entertain federal causes of action, as in *Testa v. Katt*,⁶ not because state courts are in some sense on a par with the inferior federal courts,⁷ but rather because Congress, having constitutional power to do so, determined that it is necessary to promote the supremacy of federal law for state courts to hear such cases.⁸ With the caveat that these powers must be understood to be effective in light of the Supremacy Clause, I find myself also in much agreement here.⁹

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1. Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 73 (1998).

2. U.S. CONST. art. VI.

3. 505 U.S. 144 (1992).

4. 117 S. Ct. 2365 (1997).

5. Redish & Sklaver, *supra* note 1, at 80-90. The “Judges Clause” refers to state judges being “bound” by supreme federal law, notwithstanding contrary state law. U.S. CONST. art. VI, cl. 2.

6. 330 U.S. 386 (1947).

7. Redish & Sklaver, *supra* note 1 at 75-76, 93-95.

8. *Id.* at 95 (referring to “principle of federal dominance”).

9. Redish and Sklaver argue that as a textual matter, the Supremacy Clause is not the source of federal power to impose obligations on state courts to entertain federal causes of action, but is rather the source of the state courts’ obligation to enforce an exercises of that federal power. See Redish & Sklaver, *supra* note 1, at 76, 81-88. For a competing perspective, see Evan Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1022-30 (1995) (arguing that the Supremacy Clause makes federal law supreme “in-state” law imposing affirmative obligations on courts and

While I share Redish and Sklaver's view that affirmative federal obligations can constitutionally be imposed on both state courts and state officials, I do not agree with the implication that the supremacy of federal law implies the wholesale subordinacy of state courts to inferior federal courts. I thus resist some of their proposals, especially for establishing a presumption that state courts follow federal procedures in adjudicating federal claims, and I would express their point about "commandeering" state courts somewhat differently.

State courts have authority to enforce federal law, not because they are constitutionally equal to the inferior federal courts, but because it is necessary for the union that state courts do so and because the supremacy of federal law requires state courts to do so. Yet the language of "commandeering" to describe those state court obligations¹⁰ does not cohere well with the idea expressed in *Testa* that federal law is not "foreign" to the states but is, by virtue of the Supremacy Clause, part of the state's law.¹¹ Moreover, in cases where no lower federal court has jurisdiction, state courts may be constitutionally equivalent to the lower federal courts for purposes of meeting requirements that some court whose action is reviewable by the Supreme Court have jurisdiction. While constitutional equivalency (here, in the sense of adequacy) need not mean constitutional parity, the state courts can be understood to perform these roles not because of federal "commandeering" but because part of the original understanding of the Constitution, reinforced by practice over time, was that state courts would always exist and would exercise jurisdiction in a wide range of

other state officers). Redish and Sklaver suggest that Article I (along with other enumerations of congressional power) is the true location of national power to "commandeer," and note as a benefit of their reading that the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, can be construed as a limit on appropriate use of that power. *Id.* at 87. That the Supremacy Clause does not articulate a standard like the Necessary and Proper Clause is, however, no barrier to courts filling in the gaps to make the system work. Conversely, even if the Supremacy Clause is a principal source of authority, the Necessary and Proper Clause would still bear on Congress' powers in providing for federal causes of action concurrently enforceable in the appropriate state court: Neither the text of the Necessary and Proper Clause nor the text of the Supremacy Clause, standing alone, provide complete answers; both must be considered in light of the overall constitutional structure. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 3-32 (1969) (advocating drawing inferences of constitutional meaning from constitutional structure, in contrast to proceeding from interpretations of specific constitutional text). The Supremacy Clause's clear contemplation that federal law will be resolved in the state courts might be understood to support the view that Article I powers include authority to create federal causes of action that, under at least some circumstances, state courts must hear.

10. Redish & Sklaver, *supra* note 1, use the term "commandeering" in this fashion throughout much of their argument.

11. *Testa v. Katt*, 330 U.S. 386, 389-90 (1947); *accord* *Howlett v. Rose*, 496 U.S. 356, 367 (1990) ("Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts . . . [are] a more convenient forum . . . but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.").

cases involving federal and state law.¹²

But what if the state courts do not want to entertain a federal claim or believe state law precludes them from doing so? The conventional response to this question lies in the debate over the meaning of *Testa* (and such progeny as *Howlett v. Rose*¹³): Did the state court’s obligation to entertain the federal claim in *Testa* arise because the federal government has power to force the state courts to hear matters, or did it arise because state courts are not allowed to discriminate against federal claims that are similar enough to claims they do entertain?¹⁴ But this response is something of a false dichotomy.

States do not have a choice about whether to have a court system—the Constitution requires that they do.¹⁵ All states do have court systems, which entertain a wide variety of claims.¹⁶ *Testa*’s anti-discrimination principle,

12. Several of the Constitution’s framers might well have been happy not to have had any inferior federal courts created and to allow state courts to be the initial adjudicators of all federal claims. See, e.g., 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION] (John Rutledge, of South Carolina, “arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgm[en]ts”); *id.* at 242-45 (William Patterson’s New Jersey Plan failed to provide for any lower federal courts); 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 45-46 (L. Martin and Pierce Butler objecting to Congress having power to create inferior tribunals).

13. 496 U.S. 356 (1990).

14. For an earlier argument, advanced by Professor Redish, that the “analogous case” limit on *Testa* was itself incompatible with principles of federal supremacy, see Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 355-59 (1976).

15. See generally Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV L. REV. 2180, 2246-48 (1998); see *infra* notes 38-44 and accompanying text. While the obligation to maintain a judicial system may not be judicially enforceable, *cf.* *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (nonjusticiability of claims under Republican Form of Government Clause, U.S. CONST. art. IV, § 4, that particular state government is not legitimate), it is nonetheless an obligation.

16. Even those who argue, as Professor Collins has, that *Testa* may rest on a misunderstanding of original understandings of a lack of federal power to compel the exercise of state court jurisdiction, recognize that under the narrow “discrimination” view of *Testa* the mere existence of courts of general jurisdiction in the states will provide a basis for arguing that they must entertain analogous federal actions. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 166-70. Collins argues, however, both because of doubts as to the scope and basis of federal power to compel the exercise of state court jurisdiction and because of evidence that some believed there were particular subject areas over which federally created courts needed to exercise exclusive jurisdiction, that *Testa* should not be read to go beyond the anti-discrimination principle. *Id.* I believe that Professor Collins’ arguments highlight the competing, coexisting traditions of federalism that inhere in the development of federal courts jurisprudence, and provide further reason to hold back from full endorsement of Redish and Sklaver’s logical argument. As noted below, however, I disagree with Professor

coupled with the existence of state courts of wide jurisdiction, will thus provide an arguable basis for overcoming state court refusal to entertain federal claims in most cases.¹⁷

While key aspects of Professor Redish and Mr. Sklaver's argument seem quite convincing to me, I do part company from it in some further respects (as is generally required of commentaries). The Article says, "the fact that state courts are both empowered and obligated to adjudicate and enforce federal law does not manifest historical concern, theoretical concern or respect for the status or abilities of state judiciaries, but rather the unambiguously subordinate position that state judiciaries hold within the federal system."¹⁸ Elaborating the

Collins' assumption (widely shared, I should say, by other jurists) that the states are free not to establish courts. See *infra* notes 38-44 and accompanying text.

17. I do not mean to elide the looming question, sure to arise as a result of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), whether state courts that do not have jurisdiction over certain claims against the state itself must nonetheless entertain federally created claims against the state, e.g., as an employer under the Fair Labor Standards Act. Compare *Alden v. Maine*, 715 A.2d 172 (Me. 1998) (holding no), with *Jacoby v. Arkansas Dep't of Educ.*, 962 S.W.2d 773 (Ark. 1998) (holding yes). For discussion, see Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 505 n.41 (1997) [hereinafter *Potential Evisceration of Ex parte Young*] (noting that all 50 states have at least some jurisdiction over claims against the state sounding in tort or contract, which existing jurisdiction would provide a basis, given an expansive definition of analogous claims, to require the state courts to entertain federally created claims against the State). Many states retain some areas of sovereign immunity. The question whether state courts must entertain federal claims against the state in their own courts would be, on a narrow reading of *Testa*, what are the appropriate "analogous" actions. There is some reason to think, however, that, at least if the federal courts are closed by virtue of the Court's interpretation of the Eleventh Amendment, state courts must entertain actions based on federal law even if such actions are purportedly barred by state sovereign immunity law. See Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Courts*, 59 NOTRE DAME L. REV. 1145, 1163-65 & n.76 (1984); *Potential Evisceration of Ex parte Young*, *supra*, at 504-05 & nn.40-41; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 YALE L.J. 1, 30-31 & n.130, 38 & nn.157-58 (1988) [hereinafter *State Sovereign Immunity*] (discussing *inter alia*, *General Oil v. Crain*, 209 U.S. 211 (1908)). But see Collins, *supra* note 16, at 164 n.359 (reading *General Oil* to require states to provide their own remedies for unconstitutional state action, not as requiring them to entertain a federal cause of action even if no parallel action exists in state court); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997) (asserting that only actions against officers can be compelled); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 149 (1997) (noting that historically, states were not subject to suit in state court without their consent but officers were available as defendants in proceedings contesting the legality of state action).

18. Redish & Sklaver, *supra* note 1, at 73. Redish and Sklaver argue that *Lear v. Adkins*, 395 U.S. 653 (1969), illustrates their position. Redish & Sklaver, *supra* note 1, at 93-95. There the Court held that, notwithstanding exclusive federal jurisdiction over actions to enforce patent laws, state courts hearing actions to enforce a contract could adjudicate a defense that a patent was

implications of this view for a number of areas in “judicial federalism,” they argue, *inter alia*, that Congress has substantial power to require state courts to follow federal procedures,¹⁹ and that even when Congress has not provided guidance, state courts should presumptively follow federal procedures in adjudication of federal claims.²⁰

While I agree that state judiciaries are “subordinate” to the supremacy of valid federal laws, I am not sure why we should conclude from this that they are any more so than the inferior federal courts, whose existence is not guaranteed by the text of the Constitution but is left rather to the discretion of Congress. Subordination to federal law need not imply subordination to federal courts, and legal supremacy of federal law need not imply practical superiority of federal over state procedures for the adjudication of federal claims.²¹

invalid. *Lear*, they argue, demonstrates that state courts’ authority to adjudicate federal law does not reflect positively on state courts’ ability to adjudicate federal law but “merely presumes” that such state court interpretation is “essential to maintaining federal supremacy.” *Id.* at 93. *See also id.* at 95 (“State courts are authorized to adjudicate federal patent law defenses to state law claims, but not out of federal respect for state judicial abilities to adjudicate the law in that area . . . [but rather] because to deny them such authority would seriously threaten maintaining the supremacy of the federal patent laws.”). Yet there is, at least in theory, an alternative solution to state court adjudication of the patent issues that arise in defense of a state contract claim: Congress could authorize removal jurisdiction over this narrow group of “federal question defense” cases. That removal has not been authorized may suggest that there is something more at work than the mere necessities of federal dominance in this jurisdictional pattern.

19. Redish & Sklaver, *supra* note 1, at 100-01, 108-10.

20. *Id.* at 101-08. They also propose that the Anti-Injunction Act, 28 U.S.C. § 2283 (1994) should not be viewed as a longstanding historic example of deference to state court judiciaries, but rather as a limited device designed to prevent federal interference with state court interpretation of state law. *Id.* at 95-97. Interestingly, they note that at the time the Anti-Injunction statute was first enacted, the extent of federal law was more limited than it is today, and that with the growth of federal law exceptions to the Anti-Injunction statute emerged. The doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), precluding federal court injunctions of state court proceedings even in actions brought under 42 U.S.C. § 1983 (an exception to the Anti-Injunction statute), they argue, has been mistakenly defended on grounds of deference to the state courts, though they recognize that “the deference dictated by *Younger* [arguably] could be justified by other considerations. . . .” Redish & Sklaver, *supra* note 1, at 97-99 & n.149. I find their efforts to analyze separately these strands in U.S. judicial federalism intriguing but ultimately not persuasive, to the extent that they imply that respect for the role of state judiciaries (in deciding both state and federal law) should play no role in the design of federal statutes or doctrines.

21. Compare Redish & Sklaver, *supra* note 1, at 95 (“existence of the commandeering power . . . derives from an assumption of federal dominance over state courts,” a principle that “leads to recognition of the . . . needs to have the state courts available in order to serve interests in federal convenience and federal law supremacy maintenance”), with Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX L. REV. 1743, 1785 (1992) (observing that “reverse-*Erie*” does not fully capture problem of federal procedure in state courts, because both federal courts and state courts are subject to the procedural rule).

Professor Redish and Mr. Sklaver argue that state courts are not in constitutional parity with the federal courts as adjudicators of federal law.²² Where Congress exercises its authority to create and establish inferior tribunals, this may well be right. The constitutionally guaranteed tenure and salary protections for Article III federal judges promote judicial independence in ways that states may, but need not, provide for their judges. There is thus reason to believe that federal courts have some institutional superiority in judicial independence over the state courts, derived from the structural tenure and salary provisions of Article III.²³ This kind of superiority exists, however, both in diversity cases involving state law issues and in federal question cases; the independence of the federal judiciary was evidently thought to be of potential importance in both categories of cases.²⁴

Akhil Amar and others have developed powerful arguments for why some federal court must have jurisdiction over federal question cases. Amar's argument does not distinguish between the Supreme Court and the lower federal courts for purposes of satisfying this requirement.²⁵ Nonetheless, his argument could be reshaped to support a claim of lower federal court superiority in resolving federal question and admiralty cases—cases within what he regards as the mandatory jurisdiction of the federal judiciary as a whole. One could conclude, as some excellent scholars' work suggests, that in federal question and admiralty cases it was particularly important for a court with the institutional guarantees of independence to have a final look at the case, and that given the enormous growth of caseloads the inferior federal courts must be seen as important proxies to the Supreme Court in fulfilling that requirement. Some of Amar's work may be taken to suggest as much.²⁶

22. Article III provides for diversity-based heads of federal jurisdiction (under which federal courts can decide state law claims) and, as Redish & Sklaver point out, Congress has authorized lower federal courts to hear diversity cases (including on removal from the state courts) since the creation of the federal courts in 1789. See Redish & Sklaver, *supra* note 1, at 93 n.133 and accompanying text; see also Judiciary Act of 1789, § 11, 1 Stat. 79.

23. U.S. CONST. art. III, § 1.

24. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) ("The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct, or control, the regular administration of justice" in diversity cases.). The Court does note that even stronger reasons "touching the safety, peace and sovereignty of the nation," might justify exclusively federal jurisdiction in, e.g., federal question cases. *Id.* at 347-49.

25. To the contrary, he argues that there is "parity" among all federal Article III judges for purposes of satisfying what he believes are constitutional requirements that some federal Article III decision-maker have jurisdiction to review all cases within the mandatory categories. See Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1536-39, 1559-63 (1990) (discussing parity between inferior federal court judges and Supreme Court Justices).

26. See Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 646 (1991) (questioning whether certiorari jurisdiction is adequate to assure some federal court has

Even assuming some institutional superiority of federal over state courts in the adjudication of federal law, it does not follow that the interests of states in having independent court systems are entitled to no constitutional weight in federal question cases. Between full equivalency of state and federal adjudication, and federal “dominance” of state courts with regard to state court process, lies some middle-ground recognition that state court processes should not be lightly disturbed if they are adequate to promote federal goals, even if not equivalent to what the federal courts would do. To the extent that Redish and Sklaver’s argument could be taken to imply that judicial federalism (in the sense of deference or respect for state court processes) is based only on unfounded notions of parity,²⁷ this would give me considerable pause. For as I explain below, state judiciaries are required to exist by the Constitution, and the Constitution can thus be understood to require some degree of respect for the institutions of state government, just as it establishes the supremacy of federal law.²⁸ Nonfungibility of state and federal courts does not necessarily mean that the federal government can exercise the same power over state courts that it can over interstate commerce.

As noted above, Redish and Sklaver argue from state court nonparity and the supremacy of federal law that there should be a default rule or presumption that state courts should follow federal procedures in adjudicating federal causes of action.²⁹ On this point, which is one of their central proposals, I remain unconvinced. Even if one grants all of Redish and Sklaver’s principal arguments up to this point, I am not sure it follows that we should have a rule that state courts must presumptively use federal procedures to adjudicate federal claims.

final word); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement and Hierarchy*, 86 GEO. L.J. 2445, 2474-75 (1998).

27. Redish & Sklaver, *supra* note 1, at 73-74, 92-93. Their argument may not reach so far. *See id.* at 74 n.11 (noting that some occasions might conceivably call for “federal deference to state courts”).

28. *See infra* notes 38-47 and accompanying text.

29. Redish & Sklaver, *supra* note 1, at 105-06. Their argument goes both to Congress’ power—a power I agree is substantial but which I believe is limited by the constitutional requirement that state courts exist as creatures of state governments—and to the power and propriety of federal courts articulating a new presumption in favor of federal procedural requirements in state court. Given limitations of time and space, I focus my comments on the proposed judicial presumption, and do not even address the range of issues, e.g., the implications of the Anti-Injunction statute, that their paper touches on. Note, however, the even larger range of questions one might want to consider in connection with their argument: (1) about congressional power to provide legislatively for procedural rules—in federal and/or in state courts, and for adjudication of federal and/or state claims and/or defenses; (2) about congressionally authorized or mandated judicial rule-making—in federal and/or state courts (for adjudication of federal and/or state claims and/or defenses), or in federal courts, but for application in state and federal courts; and (3) about federal adjudication of issues of procedure in state courts (on direct review of the issue itself, through the inadequate state ground doctrine, on habeas review, or on district court challenges to state court practices or procedures).

Despite its possible appeal, I plan to resist the seduction of such a bright line rule in an area as sensitive, and politically pragmatic, as federalism.

Why? First, a presumption in favor of federal procedures for the adjudication of federal claims is in tension with the proposition that the Constitution requires state governments to exist and to maintain their own judiciaries. Second, adoption of Professor Redish and Mr. Sklaver's proposal is in tension with common law methods of constitutional adjudication and respect for stability and coherence of law, particularly since deference to the processes of the state courts is manifest in a whole variety of doctrines. Third, there are practical difficulties in requiring state courts to be masters of two systems of procedure. The costs of requiring such a transition do not seem warranted absent evidence that state court procedures substantially and systematically interfere with the fulfillment of federal rights. Moreover, Professor Redish and Mr. Sklaver's proposal would sacrifice the benefits of decentralization of procedural developments from which all court systems in theory benefit. Finally, with respect to federal statutory rights, it is not at all clear that one should presume that Congress intended, by permitting or requiring state court adjudication, to override state procedures or to invite the federal courts to do so by adoption of such a presumption. One might assume, consistent with the Court's clear statement rules in other areas, that, unless Congress makes its contrary intention clear (in the language of the statute or from its central purposes), when Congress authorizes resort to the state courts, it assumes state court procedures will control. The Rules Enabling Act³⁰ might be read to suggest that federal courts' control of procedures was limited (constitutional and other federal requirements aside) to the procedures in the federal courts.

I elaborate these points briefly below, and conclude with some comments on the appeal of bright line rules and some general reasons to resist that appeal.

I. NATIONALISM VS. FEDERALISM: SUPREMACY OF FEDERAL LAW AND INDEPENDENCE OF GOVERNMENTS

In Richard Fallon's wonderful article on the ideologies of federal courts law, he identifies competing paradigms reflecting the role and relationship of the federal courts.³¹ What Redish and Sklaver call the "parity" assumption³² informs what Fallon calls the "Federalist" view, a view that emphasizes the limited jurisdiction of the federal courts, and Congress' power to limit the availability or jurisdiction of those courts and to rely instead on the state courts for adjudication.³³ Professor Redish and Mr. Sklaver's argument that the reason for doctrines of deference is not state court parity but federal necessity, fits within what Professor Fallon calls the "nationalist" paradigm, in which the federal

30. 28 U.S.C. §§ 2071-2077 (1994).

31. Richard Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1151-64 (1988).

32. Redish & Sklaver, *supra* note 1, at 92.

33. Fallon, *supra* note 31, at 1151-57.

courts are seen as the primary protectors and guardians of federal rights, particularly federal constitutional rights, and as superior to state courts in the adjudication of those rights.³⁴

I am inclined towards a middle ground, agreeing with Professor Redish and Mr. Sklaver that the state courts are not constitutionally assumed to be in parity with the federal courts, but disagreeing with the possible implication that maintaining the state courts as independent centers of adjudication is not of constitutional value. The Constitution of the United States requires *both* the supremacy of valid federal law *and* the existence of both state and federal governments accountable to their respective constituencies.

The supremacy of federal law is perhaps the cardinal structural principle of the federal system. The Constitution as law binds all public officials, federal and state. Valid federal laws, that is, laws enacted pursuant to the Constitution, likewise bind all.³⁵ The supremacy of federal law should not be regarded as one to be grudgingly acknowledged, as Justice O'Connor's opinion for the Court in *New York v. United States*³⁶ might suggest, but rather is a foundational feature of the constitutional structure, the feature that has made and continues to make the United States a union, rather than a federation bound only by treaty.³⁷

But the power to impose federal duties on state officers or to establish rules for state courts is not unlimited. The Constitution not only requires that state governments exist, but requires that state governments maintain courts,³⁸

34. *Id.* at 1158-64.

35. The debate in *Printz* was over the scope of valid federal laws—whether Congress can constitutionally compel state officers to execute federal law. *Printz v. United States*, 117 S. Ct. 2365, 2376 (1997). In an earlier article, I argued that *Printz* was wrong to adopt a categorical rule that the national government could not conscript state officers in this business. See Jackson, *supra* note 15, at 2199-2200. I share Professor Redish and Mr. Sklaver's view that the distinction between state courts and state executive officers is not a tenable one, though I place greater weight on constitutional structure and history than on constitutional text in reaching this conclusion.

36. 505 U.S. 144, 159 (1992) (noting Court's prior observation that the "Supremacy Clause gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power") (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)); *but cf.* *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (holding that the Eleventh Amendment barred lower federal courts from hearing suit for injunctive and declaratory relief against state officials concerning Indian tribes claim of title, under federal law, to submerged riverbed lands held by the State). In *Coeur d'Alene* it is Justice Kennedy, joined by the Chief Justice, who strongly asserts state court parity and the irrelevance of the Supremacy Clause in allocating jurisdiction between inferior federal courts and state courts, *id.* at 2037, and Justice O'Connor, joined by Justices Scalia and Thomas, who takes a more nationalist position. *Id.* at 2045-46 (O'Connor, J., concurring in part and concurring in the judgment).

37. See Weinberg, *supra* note 21, at 1797 (describing presumption in favor of state law until a conflict with federal law arises, and describing the "Supremacy Clause [as] a sleeping giant in our polity").

38. See U.S. CONST. art. VI, § 3 (requiring state judicial, as well as executive and legislative officials, to take an oath); *id.* at art. VI, § 2 (Supremacy Clause referencing state court judges); see

legislatures³⁹ and an executive.⁴⁰ In other words, state governments must possess the basic structures needed for a multi-purpose government to function with legitimacy in a representative democracy.⁴¹ As Professor Merritt has argued, the Guarantee Clause⁴² can be read to impose duties on states to maintain the kind of government that republicanism requires and to limit the federal government from interfering with states' republican, self-governing authority.⁴³ And courts were essential to the understanding of good principles of republican government at the time of the framing.⁴⁴

also Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2012-13 (1993) (arguing that states can not abolish their courts).

39. See U.S. CONST. amend. XVII, cl. 1 (mandating popular election of senators by those voters having the "qualifications requisite for electors of the most numerous branch of the State legislatures"); *id.* art. V (identifying involvement of state legislatures in amendment process); *id.* art. IV, § 3, cl. 1 (prohibiting formation of states from the territory of existing states without the consent of the legislatures of the existing state in question); *id.* art. II, § 1, cl. 2 (requiring states to appoint presidential electors "in such Manner as the Legislature thereof may direct"); *id.* art. I, § 8, cl. 17 (requiring the "Consent of the [state] Legislature" for certain federal purchases of property); *id.* art. I, § 2, cl. 1 (requiring that qualifications to vote for federal representatives be the same as those for voting for members of the most numerous branch of the state legislature).

40. See U.S. CONST. amend. XVII (requiring the "executive authority" of state to call special election for Senate vacancies or, if so empowered by state legislature, to make temporary appointments); *id.* art. IV, § 4 (United States to provide protection against "domestic violence" on request of the state legislature or, if need be, "of the Executive"); *id.* art. IV, § 2, cl. 2 (requiring that, on demand of "executive Authority of the State from which he fled," fugitives from justice be returned); *id.* art. I, § 2, cl. 4 (requiring the "Executive Authority" of the states to call elections to fill House vacancies). See generally Jackson, *supra* note 15, at 2246-47.

41. Because I understand the Constitution to require the states to maintain such structures (leaving aside questions of justiciability for the moment), I disagree with those who question whether states have such an obligation. See, e.g., Collins, *supra* note 16, at 191 & nn.427-28 (arguing that the Constitution does not impose a mandate on states to create courts); see also *Johnson v. Fankell*, 117 S. Ct. 1800, 1805 (1997) (suggesting states are not obligated to create a court to hear particular federal cases); *Kenney v. Supreme Lodge of the World*, 252 U.S. 411, 414 (1920) (suggesting that "there is truth in the proposition that the Constitution does not require the State to furnish a court").

42. U.S. CONST. art. IV, §4.

43. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 22-26 (1988).

44. See THE FEDERALIST NO. 9, at 38 (Alexander Hamilton) (Garry Wills ed., Bantam 1982), (listing the means by which the republican form of government (there, referring to the whole United States) can be sustained, which list includes the division of powers between the departments and "the institution of courts"); THE FEDERALIST NO. 21, at 99-100 (Alexander Hamilton) (Garry Wills ed., Bantam 1982) (noting need to guarantee the state constitutional governments, to prevent tyranny and despotism in a state, both to protect its inhabitants' liberties and to protect neighboring states from the adverse effects of despotic rule in another); THE FEDERALIST NO. 43, at 221 (James Madison) (Garry Wills ed., Bantam 1982) (defending the Guarantee Clause as extending to existing

The structures of state governance, required by the Constitution, must be defined and created in important ways by the separate states.⁴⁵ States and their governments are, in a sense, “interwoven” into the infrastructure of the union.⁴⁶ The foundational principle of the supremacy of federal law, then, is kept from becoming an unduly centralizing dictatorial power in part by the limitations on the federal government’s authority, which are defined by the requirement that state governments remain independently accountable to their constituencies.

State courts, then, are part of the constitutional infrastructure contemplated and required by the Constitution.⁴⁷ They have existed since before the beginning

“republican forms” of government in the states and to the substitution of “other republican forms,” but limiting states so that they “shall not exchange republican for anti-republican Constitutions” and acknowledging that majorities in a State can form an “illicit combination” to threaten the magistracy). Cf. Carlos Manuel Vázquez, *The Constitution as Law of the Land: The Supremacy Clause and Constitutional Remedies* (March 1998) (unpublished manuscript at 48-56, on file with author) (explaining framers and ratifiers views of importance of court sanction in application of law). Although other parts of the Federalist Papers can be read to suggest that a “republican form of government” is one simply that must derive all its powers directly or indirectly from the great body of the people, THE FEDERALIST NO. 39, at 190 (James Madison) (Garry Wills ed., Bantam 1982), the link between the guarantee of republicanism and protecting the liberty of the people from despotism suggests that Alexander Hamilton’s list of the means to preserve a republican form of government could have been understood to apply, at least in its broad outlines, to the state governments as well as the federal.

45. See Merritt, *supra* note 43, at 23-26 (summarizing evidence that at the core of understanding of republican government was the idea that the people control their rulers and have power to decide on, run and change their forms of government).

46. Cf. THE FEDERALIST NO. 43, at 221 (James Madison) (Garry Wills ed., Bantam 1982) (noting that “there are certain parts of the State constitutions which are so interwoven with the Federal Constitution that a violent blow cannot be given to one without communicating the wound to the other”).

47. Professor Collins has argued that “[t]o assume that state courts *would* exist as an underlying premise of the [Madisonian] Compromise does not mean that it was part of the Compromise that they *must* exist.” Collins, *supra* note 16, at 193 n.432. While old expectations of what would happen should not *ipso facto* control, I am not persuaded here that Professor Collins is correct. Note that, in determining the meaning of the Eleventh Amendment, the Court has insisted that expectations of the framers as to the sovereign immunity of the states became part of the Constitution as background “postulates” which control, see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 68 (1996) (citation omitted), even in the teeth of constitutional language that is more consistent with narrower understandings and even where the purportedly broad understanding of state immunity was contested during the Constitution’s ratification process by both supporters and opposers of ratification. See *id.* at 101, 109-149 (Souter J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 252-80 (1985) (Brennan, J., dissenting); *State Sovereign Immunity*, *supra* note 17, at 46-48. If—as I believe is the case with respect to the structures of state government—framers and ratifiers not only widely assumed a certain state of affairs as the “underlying premise” of the Constitution, but wrote and ratified a document whose multiple provisions explicitly refer to their existence, this underlying premise can be spoken of as required

of national life under this Constitution. State courts are created by the state governments and remain accountable to their states. While they are bound to respect the supremacy of federal law, federal law is, generally, bound to respect state courts' existence as creatures of state governments.

The Fourteenth and other post-Civil War Amendments, on any historical account, changed the relationship of the federal government to the state governments. Congress' Section 5 enforcement power contemplated direct federal impositions on the states, who are the parties addressed by the major substantive rules of those amendments: "No state shall make or enforce any law . . . nor shall any State deprive any person of life, liberty or property . . . nor deny to any person within its jurisdiction the equal protection of the laws."⁴⁸ A complete theory of federalism, including judicial federalism, in the United States must fully account for this development—a part of the Constitution oddly missing from the historical exegesis of the major federalism opinions of the last decade,⁴⁹ at least until *City of Boerne v. Flores*.⁵⁰

Does the Fourteenth Amendment contemplate the destruction or subjugation

by the Constitution to the extent that it builds upon it. Where Professor Collins' argument may have more bite is in whether the Constitution assumed that the federal government could compel states to create, for example, state courts. I am inclined to read the Republican Form of Government Clause as authorizing federal interference in the governance of states to achieve the minimal requisites of republicanism, but can take this position without necessarily taking the position that the federal courts, without action from the political branches, could force such change. Consider the example of Reconstruction. One way to think of it is to see this as a fundamentally extra-constitutional moment. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 42, 44-47 (1991) (noting procedural irregularities and dubious legality of adoption of the post-Civil War amendments). Another is to see Reconstruction and the federal military presence in the south as designed not only to secure the freedom of the former slaves but also to secure the functioning of minimally republican forms of government, including civilian courts. Cf. David A. J. Richards, *Revolution and Constitutionalism in America*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES* 129-30 (Michael Rosenfeld ed., 1994) (suggesting that under the Guarantee Clause Congress could propose amendments to ensure republican government in the South and "reasonably exclude non-republican Southern states from their constitutional position in the Union until they agreed to and conform[ed] with the amendments"). That the remedy for a complete absence of functioning state civilian courts is federal military tribunals does not mean that states do not have an obligation to provide such courts, and is not necessarily dispositive on the obligations of state courts that do exist.

48. U.S. CONST. amend. XIV, § 1.

49. See *New York v. United States*, 505 U.S. 144, 155-59, 161-66 (1992); see also *id.* at 159 ("The actual scope of the Federal Government's authority with respect to the States has changed over the years . . . but the constitutional structure underlying and limiting that authority has not."). For a contrasting willingness to consider enactments pursuant to the Fourteenth Amendment as bearing on understandings of federalism, see *id.* at 209 (White, J., dissenting in part) (noting use of suits under 42 U.S.C. § 1983, enacted pursuant to Fourteenth Amendment, to enforce conditions in statutes enacted under the Spending Clause of Article I).

50. 117 S. Ct. 2157 (1997).

of the states as separate units? Unlikely. It refers to the states as the entities to whom its admonitions are directed.⁵¹ It retains the use of the states as the vehicle by which representatives are to be apportioned.⁵² And it specifically contemplates the continued existence of "Executive and Judicial officers of a State, [and] . . . the Legislature thereof."⁵³ The Seventeenth Amendment, while providing for direct election of Senators, retained the distribution of two Senators from each state, and assumed the continued existence of state legislatures and of an executive authority of the state.⁵⁴

Does the Fourteenth Amendment contemplate that Congress, through its enforcement powers, can impose added prohibitions, or duties, upon state governments? Undoubtedly. Even *City of Boerne*, which adopts a more restrictive view of congressional power than some of the earlier cases, emphasizes that Congress has broad remedial powers to impose rules on state governments in order to prevent states from violating the provisions of Section 1 of the Fourteenth Amendment.⁵⁵ Whether the federal courts, exercising jurisdiction over claims that states have violated Section 1 of the Fourteenth Amendment without the benefit of statutory guidance from Congress, can impose added prohibitions or duties to vindicate constitutional rights is perhaps more controversial, but that they have some power to do so is well established.⁵⁶

But I should think an extraordinary showing of need, based on the post-Civil War Amendments, should be required before federal law (even if enacted by Congress and *a fortiori* if imposed by a court) could require the "take over" of the state courts in a way that would leave them, in some fundamental way, not functioning as state courts. For many of the values served by the existence of state court systems continue to have salience in a post-Fourteenth Amendment world. The Supreme Court has alluded to the "fundamental constitutional independence of the States and their courts" as a reason not to "enlarge" exceptions to the prohibition on injunctions of state court proceedings "by loose statutory construction."⁵⁷ In fact, some have argued that the state courts were intended to play a larger role than current doctrine allows them in restraining federal abuses,⁵⁸ a view many scholars agree with.⁵⁹ Although a powerful image

51. U.S. CONST. amend. XIV, § 1. It has been suggested that the Due Process Clause, U.S. CONST. amend. XIV, § 1, might itself be understood to require states to maintain adjudicatory bodies capable of providing such "process."

52. U.S. CONST. amend. XIV, § 2.

53. U.S. CONST. amend. XIV, § 2.

54. U.S. CONST. amend. XVII.

55. *City of Boerne*, 117 S. Ct. at 2163-64; see also *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

56. See e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990) (upholding authority of lower federal court to require local government unit to levy taxes to finance needed improvements in schools that had been segregated); *Milliken v. Bradley*, 433 U.S. 267 (1977) (upholding desegregation order requiring expenditures of state funds for various educational improvements).

57. *Atlantic Coast Lines v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970).

58. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509-10

of state courts that lingers from the 1950s and 1960s is of recalcitrance in rejecting the morally reprehensible American racial apartheid, some state courts in recent decades have exercised leadership in a variety of rights-expanding movements both in adjudication,⁶⁰ and in the administration of justice.⁶¹

I agree with Professor Redish and Mr. Sklaver that theories of "dual federalism" are not accurate models to use here, and are inconsistent with the well-established power of the Supreme Court to review state court decisions.⁶² Yet the intellectual failure of the doctrine of "dual federalism" need not mean that there is no federal interest in protecting state institutions of government. A quick comparative look at federal legal systems demonstrates that there are a

(1987).

59. See, e.g., Daniel J. Meltzer, *Congress, Courts and Constitutional Remedies*, 86 GEO. L.J. 2537, 2566-67 (1998) (suggesting that *In re Tarble*, 80 U.S. (13 Wall.) 397 (1871), should not be understood as a sound constitutional decision). See also John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 n.4 (1998) (describing himself to similar effect as a "Tarble skeptic").

60. See, e.g., *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994) (holding unconstitutional, under federal Constitution, a state constitutional amendment, adopted by referendum, prohibiting state from enacting legislation to extend protections against discrimination based on sexual orientation), *aff'd*, *Romer v. Evans*, 517 U.S. 620 (1996); *Baehr v. Levin*, 852 P.2d 44, 67 (Haw. 1993) (finding that marriage statute that did not permit same-sex marriages was presumptively unconstitutional unless on remand the distinction could be justified by a compelling state interest and as narrowly drawn to avoid intrusion on constitutional rights); *Robinson v. Cahill*, 303 A.2d 273, 297-98 (N.J. 1973) (holding that under New Jersey state constitutional right to an efficient public education existing funding arrangements, which involved property taxes, were invalid and had to be equalized).

61. See, e.g., NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, FIRST YEAR REPORT (1984); NEW YORK TASK FORCE ON WOMEN IN THE COURTS REPORT, *reprinted in* 15 FORDHAM URB. L.J. 11 (1986); FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, REPORT, *reprinted in* 42 FLA. L. REV. 803 (1990); COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, REPORT (1991). Indeed, scholars and federal judges have remarked on the important lead taken by the state courts in conducting self-studies of gender or race bias well in advance of the willingness of the federal courts to do so. See Ruth Bader Ginsburg, *Foreword*, 84 GEO. L.J. 1651, 1652 (1996) (noting that "[s]tate courts were the pioneers" in studying gender bias); Vicki C. Jackson, *What Judges Can Learn From Gender Bias Task Force Studies*, 81 JUDICATURE 15, 38-39 (1997) (noting benefits of interactive judicial federalism seen in the spread of task forces); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1759-92 (1991); see also SPECIAL COMMITTEE ON GENDER, REPORT TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS (1995), *reprinted in* 84 GEO. L.J. 1657, 1671 (1996) (noting that the "first judicially-sponsored inquiry into gender bias in the courts was that of New Jersey," and that close to 40 court systems have appointed task forces since the New Jersey report).

62. See Redish & Sklaver, *supra* note 1, at 87-88 (attacking the *Printz* Court for inconsistency in espousing dual federalism but recognizing that state courts can be commandeered). For my critique of *Printz*, see Jackson, *supra* note 15, at 2183-2205.

multiplicity of forms of federalism. In Belgium, for example, some powers (e.g., over economic development) are exercised by territorially defined “regions,” while other powers (e.g., over education and culture) are exercised by nongeographic linguistic communities, and still others are exercised by the central government but often in tandem with regional or community governments.⁶³ In Northern Ireland, the recent constitutional changes result in sharing of sovereignty across different national lines.⁶⁴ In Canada, powers are divided between the federal governments and the subnational governments (provinces), but the Supreme Court has the final word on the meaning and nature of provincial law.⁶⁵ Thus, the inadequacy of “dual federalism” to describe the relationships of governments in the United States does not imply that there is no meaningful variety of federalism at work.

The argument for complete federal court superiority in the adjudication of federal claims, particularly under the Constitution of 1789, assumes away one further problem, an “old constitution” problem.⁶⁶ In the Eighteenth and

63. See Alexander Murphy, *Belgium's Regional Divergence: Along the Road to Federation*, in *FEDERALISM: THE MULTIETHNIC CHALLENGE* 73, 85-88 (Graham Smith ed. 1995); ANDRE ALLEN & RUSEN ERGEC, *FEDERAL BELGIUM AFTER THE FOURTH STATE REFORM OF 1993* (Ministry of Foreign Affairs, Brussels 1994). Belgium's extension of powers to negotiate and conclude foreign treaties to the Communities and Regions, subject to some review by the King, is quite unusual (indeed, may be unique) in federal nations. See *id.* at 29-30.

64. In 1998 the Republic of Ireland, the United Kingdom and the political parties in Northern Ireland created new constitutional arrangements in an effort to resolve conflict in and over Northern Ireland. Under the peace agreement, approved by public referenda in the Republic of Ireland and the six counties of Northern Ireland on May 22, 1998, several cross-border political bodies are established: a North-South Council is to be composed of ministers from both Northern Ireland and the Republic of Ireland and will exercise joint responsibilities in matters affecting the entire island, such as tourism, transportation and the environment. A consultative body, the Council of the Isles, is also established, to foster discussion among members of the Irish and British Parliaments and the local assemblies in Northern Ireland, Scotland, and Wales. See Warren Hoge, *The Irish Vote*, N.Y. TIMES, May 24, 1998, at A1; Warren Hoge, *Vote for Assembly Realigns Northern Ireland Royalties*, N.Y. TIMES, June 28, 1998, at A6; *An Irish Accord: The Next Steps*, N.Y. TIMES, Apr. 16, 1998, at A5;

65. See Martha Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107 (1992).

66. For a collection of essays many of which focus on interpretation of older constitutional texts, see *CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS* (Eivind Smith ed., 1995). For a sampling of these reflections contained in *CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS*, see Michel Troper, *The Interpretation of the Declaration of Human Rights By a Constitutional Judge*, at 161, 164-74 (the only “truly objective quality of the Declaration” of the Rights of Man and Citizen of 1789 is that “it is a very old document”; its age could affect interpretation through providing opportunity for a long interpretive tradition, or through requiring divination of the intentions of its authors, or through its bearing on whether to interpret its text as in conflict or not with later sources of law); Henry Paul Monaghan, *The Constitution of the United States and American Constitutional Law*, at 175, 177, 182 (stating that “what is of importance to American

Nineteenth Centuries, the separation between state and federal law was not so sharply felt as it is in the more positivist world of law today.⁶⁷ As noted above, in other federal, constitutional systems today the federal Supreme Court has the last word on the meaning of state or provincial law. The highly positivist view of law expressed in the post-*Erie*⁶⁸ understandings of the division between state and federal law is not the only one possible: State law can be conceived to exist apart from the views expressed by organs of the state government, just as the "true" meaning of the federal Constitution can be conceived as different from what the Supreme Court says. *Erie* was a fairly recent development in constitutional history. It is plausible with respect to the Fourteenth and other post-Civil War Amendments, particularly those addressed specifically to the exercise of state power, that federal courts are the preferred adjudicators; should this mean that federal courts are the preferred adjudicators of other claims of federal laws, e.g., under the labor laws, securities laws, etc.? The answer is by no means obvious.

Federal courts as adjudicators may well be "superior" in the sense of being more independent and impartial in their decision-making than state courts, particularly when compared to state judiciaries where the judges must run for election on a regular basis. The importance of their judicial independence is real, and is constitutionally secured. Strong arguments exist that the Article III federal courts are accordingly constitutionally superior adjudicators to the state courts, which may, but need not, provide for comparable guarantees of judicial independence. But assuming arguendo the superiority of federal adjudication of federal claims, I want now to consider Professor Redish and Mr. Sklaver's argument in favor of a presumption that federal procedures should control state court adjudication of federal claims.⁶⁹

lawyers and judges is the constitutional law of the United States, not the Constitution of the United States;" and "original understanding simply cannot constitute the sole legitimate canon for constitutional adjudication"); Frank Michelman, *Construing Old Constitutional Texts: Regulation of Use As 'Taking' of Property in United States Constitutional Jurisprudence*, at 227, 233 (suggesting that differing ages of takings clause of 1787-89 and Due Process Clause of Fourteenth Amendment could affect interpretation and analysis of regulatory takings claims); Francis Delp  r  e, *Complementary Sources to Old Constitutional Texts*, at 253, 262 (arguing that constitutions define their own interpreters, contemplating both reinterpretation over time and continuity with tradition).

67. See William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1521-25 (1984) (noting lack of clarity on nature and source of general common law); cf. Woolhandler, *supra* note 17, at 108-09 (noting that in the 19th century the federal courts' diversity jurisdiction was an important location for elaborating federal law, far less constrained by the forms of action and procedures of the state courts than has been supposed).

68. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

69. Redish & Sklaver, *supra* note 1, at 99-108. The proposal they advocate is, I believe, for a "strong presumption in favor of the use of federal procedure when a state court is called upon to adjudicate a federal cause of action." *Id.* at 105. It is not clear whether this is more rigorous than, or similar to, an alternative standard, described earlier in their paper, under which "state courts must

II. WHY NOT A DEFAULT RULE

I make two kinds of arguments here: a utilitarian argument about the costs and benefits of the transition to a new system and of the new system itself; and a quasi-constitutional argument about the status of the state courts in the federal system. I begin with the constitutional argument.

Mandating wholesale use of federal rules of procedure in state court cases based on federal law is in tension with the constitutional requirement that states maintain judiciaries and with the history of the relationship of state and federal courts. Part of being a court system is the ability to participate in determining the procedures by which court business is conducted.⁷⁰ The rules of procedure cover a wide range of concerns, from the relatively minute to important questions of allocating decisional authority between judge and jury. The Supreme Court case law to date provides little support for the idea that when state courts sit to hear federal claims they do so in effect as federal courts.⁷¹ Indeed, Nineteenth

always employ federal procedures in enforcement of a substantive federal cause of action, at least absent the resulting need for a significant restructuring of the state judicial system in order to accommodate the federal procedures.” *Id.* at 101. The proviso for “significant restructuring,” were it adopted, might prove to be similar in the field of procedure to *Testa*’s possible limitation in the field of jurisdiction of the requirement that state courts entertain federal causes of action, at least where state “courts have jurisdiction adequate and appropriate under established local law” to adjudicate similar actions. *Testa v. Katt*, 330 U.S. 386, 394 (1947). The question of whether following a federal procedure would require “significant restructuring” might be relevant both to congressional power to require such a procedure, and to whether a judicially created presumption should be followed. If, for example, Congress sought to require that state judges receive the identical guarantees of salary protection and tenure during good behavior that federal judges have, would this be within Congress’ Article I powers? its Fourteenth Amendment powers? Or would the constitutional requirement that there be state courts bar federal imposition of tenure and salary requirements? *See Merritt, supra* note 43, at 40-58 (suggesting that Guarantee Clause, U.S. CONST. art. IV, § 4, should bar federal interference with procedures by which state officials are chosen, their term of office and their qualifications for office).

70. Thus, while Congress has power to provide for rules of procedure for the federal courts, federal courts also “have traditionally exerted strong inherent power” as courts to develop and apply rules relating to the “administration of legal matters.” *Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965) (quoting *Lumbermen’s Mutual Casualty Co. v. Wright*, 322 F. 2d 759, 764 (5th Cir. 1963)); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (upholding federal district court’s inherent power to manage its own proceedings and impose sanctions). Moreover, federal courts exercise considerable influence on congressional changes in federal rules, an influence individual state court systems are more likely to have in their own state legislatures than in Congress.

71. *See Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 221 (1916), *referred to with approval in* *Howlett v. Rose*, 496 U.S. 356, 370-71 n.17 (1990). *Cf. Byrd v. Blue Ridge Coop.*, 356 U.S. 525, 537 (1958) (suggesting that a “countervailing factor” to arguments for applying a state procedural practice in a federal court adjudication of a state substantive claim was that federal courts are “an independent system for administering justice to litigants who properly

Century cases on occasion expressed doubt whether federal law could force state courts to exercise jurisdiction they thought they did not have under their particular states' law,⁷² a conclusion that cases in this century have fairly clearly rejected.⁷³ But greater powers need not necessarily follow from smaller ones.

Federal constitutional law does constrain procedures in state court cases: The Due Process Clause requires certain minimally fair adjudicatory processes in all cases,⁷⁴ and criminal cases are constrained by the various amendments that relate to criminal procedure.⁷⁵ Yet the Constitution's constraints on state judicial process are more relaxed in civil than in criminal cases, since the Seventh Amendment's requirement of jury trials has been held not to apply to the state courts.⁷⁶ While federal statutes or the Constitution may sometimes require that

invoke [their] jurisdiction"). Established under state, not federal, governments, state courts function somewhat as "independent system[s]" for the same purpose, and may likewise have interests generally in being able to follow their own state procedures. *Id.*

72. See Collins, *supra* note 16, at 145-65 (describing early opinions as distinguishing between state court judges obligation to apply federal law in cases they heard and an obligation to assume unwanted jurisdiction).

73. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947); *General Oil v. Crain*, 209 U.S. 211, 226-28 (1908).

74. U.S. CONST. amend. XIV, § 1.

75. See U.S. CONST. amends. IV, V, VI, VIII.

76. See *Bombolis*, 241 U.S. at 216-17, cited with approval by *Georgia v. McCollum*, 505 U.S. 42, 52 (1992). By contrast, most of the Bill of Rights provisions relating to criminal procedure have been applied to the states. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to appointed counsel for indigents). This might be thought to reflect the relative magnitude of the federal interests in having minimum procedural standards followed by state courts in criminal cases as compared with civil cases.

Note, however, that Redish and Sklaver apparently would not extend their presumption to state causes of action in which federal issues or defenses arise (which would exempt state criminal trials), on the ground that states have a stronger interest in the enforcement of their own substantive law in accordance with their own procedures. Redish & Sklaver, *supra* note 1, at 105 n.180. Yet even if the state's interest in pursuing its own procedures is greatest here, one might also think that it is in state criminal cases where it is most important that federal procedures apply. As Professor Meltzer has pointed out, close to half of all criminal cases appealed to state supreme courts involve questions of federal constitutional law. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1177 (1986) [hereinafter *State Court Forfeitures*]. Because many of these federal issues arise late in the lower court proceedings, providing for removal to federal court (and thereby assuring federal procedures) seems impracticable. *Id.* at 1178. In cases involving an affirmative federal cause of action over which state and federal courts have concurrent jurisdiction, both plaintiff and defendants can, under existing jurisdictional statutes, generally elect to proceed in federal court. See 28 U.S.C. § 1441(a), (b) (1994) (permitting defendants, regardless of citizenship, to remove any case that could have been filed initially in federal court under federal question jurisdiction). Thus, removal jurisdiction is a more available solution to concerns over state court procedures that interfere with effective enforcement of affirmative federal statutory claims than with respect to state criminal cases, which might argue in favor of a very different approach

particular procedures be used or not,⁷⁷ it is not clear to me why the power to prescribe or preempt particular rules to further the substantive goals of a statute within Congress' power necessarily implies the "greater" power to supplant state procedural law in any federal question case.⁷⁸ The latter would seem more to be

than that proposed by Professor Redish and Mr. Sklaver.

77. For an argument that the inadequate state ground doctrine should be treated as a form of federal common law that should control state court procedure, see *State Court Forfeitures*, *supra* note 76. Meltzer's argument is far more limited than Redish and Sklaver's, emphasizing that federal law would remain "interstitial," establishing a "floor with which states must comply, rather than . . . displac[ing] state law entirely. The states do have the primary lawmaking responsibility for establishing the procedures in their courts." *Id.* at 1132.

78. In *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952) the holding that the validity of a release challenged as induced by fraud was a question of fact for the jury, rather than the judge, was supported by the policy of the federal statute to provide more generous protection to injured workers than had resulted under the application of common law rules of substance and procedure. See *id.* at 363 ("[T]o deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence is 'to take away a goodly portion of the relief which Congress has afforded them.'"); cf. Alfred Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384, 397 (1956) (discussing reasons to limit *Dice*'s holdings to FELA proceedings). In both *Felder v. Casey*, 487 U.S. 131, 134 (1988) and *Howlett v. Rose*, 496 U.S. 356, 383 (1990), the state court rule that was overridden was found to be inconsistent with the basic purpose of the federal statute (though in *Howlett* the Court also found that the state rule was not a neutral "valid excuse" because it would not have barred state tort suits against the same kind of defendants. *Howlett*, 496 U.S. at 371).

If the underlying substantive law of tort liability for the hazards of tobacco smoking were federalized (and assuming that this action is otherwise constitutional, e.g., is not unconstitutionally retroactive), I am inclined to agree with Redish & Sklaver, *supra* note 1, at 108-10, that Congress would have substantial power to provide for particular procedures "integral" to or "bound up with" the statutory scheme (e.g., limiting multi-party actions) and that these would be enforceable in the state courts. See *Dice*, 342 U.S. at 363 (treating jury trial as "part and parcel" of FELA remedy required in state courts); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 298-99 (1949) (reversing state court dismissal of FELA complaint based on failure to comply with strict local pleading rule which could "defeat" assertion of federal rights); see also *Felder v. Casey*, 487 U.S. 131, 138 (1988) (finding state notice-of-claim procedure "conflicts in both its purpose and effects with the remedial objective" of § 1983 and could not constitute grounds for state court dismissal); cf. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958) (finding that state procedure was not "integral" to or "bound up with" substantive law and did not apply in federal adjudication of state substantive claim). *Felder* also concluded that enforcement of the notice-of-claim statute in state court § 1983 actions would "frequently and predictably produce different outcomes" than if the same case were filed in federal court, and that such outcome-determinative state law could not be applied by state courts entertaining substantive federal rights. *Felder*, 487 U.S. at 141. For different treatments of the outcome-determinative test for determining when *federal* courts must apply *state procedural* law, see *Byrd*, 356 U.S. at 537 (balancing various factors); *Hanna v. Plumer*, 380 U.S. 460, 466-68 (1965) (linking "outcome determinative" test to goals of avoiding forum shopping and inequitable law administration); *Gasperini v. Center for Humanities*, 518 U.S. 415

an exercise of power to make laws "necessary and proper" for another department to carry out its responsibilities—a power Congress has with respect to the federal courts but not with respect to organs of state government—rather than an exercise of power tailored to an enactment under a specific power such as the Interstate Commerce Clause,⁷⁹ or the Copyright Clause.⁸⁰

If there is some doubt as to Congress' power to mandate wholesale adoption of, for example, the Federal Rules of Civil Procedure by state courts, even in federal question cases, one might think that *a fortiori* there is reason for federal courts to hesitate to adopt such a wholesale presumption as a matter of federal statutory interpretation or federal common law.⁸¹ Indeed, clear statement rules designed to prevent the judiciary from trenching on traditional powers of the states absent clear congressional direction stand in marked contrast to Professor Redish and Mr. Sklaver's proposal for federal courts to take such a move on their

(1996). See also Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini*, 46 U. KAN. L. REV. 751, 756, 769 (1998) (criticizing *Gasperini* for invoking *Hanna* "twin aims" test without explaining how difference in state and federal standards for new trials would affect litigant behavior).

79. U.S. CONST. art. I, § 8, cl. 3.

80. U.S. CONST. art. I, § 8, cl. 8. A different set of questions might arise were Congress to act under its Fourteenth Amendment power to enforce the guarantee of "due process" by requiring state courts to apply some federal rules of procedure in all cases. Cf. Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1079 (1988) (noting the importance of the Civil War Amendments for the role of state courts).

81. Consider here Professor Meltzer's comments:

I do not mean to suggest that state rules ordinarily must yield [when federal rights are litigated in state courts]; one would hope that state procedural systems are free from systematic pathology. . . . The reasons for a presumption that state procedural rules should apply when federal rights are at issue in state courts are straightforward. State rules of practice and procedure serve legitimate purposes of judicial administration in state courts, purposes that ordinarily do not conflict with or impair the vindication of federal rights. Moreover, reliance upon state law avoids the need to apply different rules of practice in state courts for state and federal claims. It is also possible that the operation in different states of different systems of practice and procedure may permit desirable variety and experimentation. For all these reasons, here as elsewhere there must be forceful reasons to justify formulation of a distinctively federal rule.

State Court Forfeitures, *supra* note 76, at 1182.

Meltzer also suggests that the interests of civil litigants in having federal questions litigated are generally less weighty than those of criminal defendants, and that there is therefore more reason to require civil litigants to comply with state court procedures and bar review of their federal claims where those claims have been forfeited under state procedural law. Thus, his article suggests, there are good reasons to retain the presumption that state procedure controls litigation in state courts and that if there is a class of cases in which such a presumption should be less strongly enforced it is in criminal, not civil, cases in the state courts. *Id.* at 1213-14.

own.⁸²

A presumption to apply federal rules in the adjudication of civil claims based on federal law could have a sweeping effect, turning state courts into “junior varsity” versions of federal courts.⁸³ While federal procedures may need to be followed where, under existing case law, they are integral to the substantive purposes of the statute, or where state procedural rules pose a substantial burden on vindication of federal law,⁸⁴ this case-by-case or issue-by-issue determination accords more with the constitutional status of the state courts as a separate judicial system, organized under a different government power, than a blanket rule favoring federal procedures.

Professor Redish and Mr. Sklaver’s approach would also be in tension with the history of the relationship between procedures in state and federal courts. The Process Act of 1789⁸⁵ required that

except . . . [as] otherwise provided [by statutes of the United States], the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.⁸⁶

The mandate for the lower federal courts to follow the procedures of their respective state courts was not abandoned until the 1930s, with enactment of the Rules Enabling Act in 1934 and subsequent adoption of the Federal Rules of Civil Procedure in 1938.

The Redish and Sklaver proposal is also inconsistent with a fairly sizable body of law, across such issues as abstention, the Eleventh Amendment, federal habeas corpus availability, and the adequate state procedural ground doctrine.⁸⁷ The most recent edition of Hart & Wechsler says that “in general, state rules of practice presumptively determine the time when, and the mode by which, federal claims must be asserted in the state courts.”⁸⁸ It is possible that this practice has

82. Redish & Sklaver, *supra* note 1, at 101-02. Query how, if state courts adopted wholesale federal practice and procedure in adjudicating federal rights, this would affect “litigant choice” as a value in federal jurisdiction—would it be eliminated? or would the litigant simply be judge shopping?

83. *Cf. Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (characterizing the U.S. Sentencing Commission as an impermissible “junior-varsity Congress”).

84. For a thoughtful effort to identify specific differences in procedural rules that unduly burden adjudication of individual constitutional rights claims in state courts, see Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 724 (1981). *Cf. Johnson v. Fankell*, 117 S. Ct. 1800, 1805, 1806 & n.12 (1997) (indicating that neutral state rule should not be preempted by federal procedural right unrelated to substantive federal statutory purpose).

85. Act of Sept. 29, 1789, 1 Stat. 93.

86. *Id.*

87. *See supra* note 21.

88. RICHARD H. FALLON ET AL., HART & WECHSLER’S FEDERAL COURTS AND THE FEDERAL

been, or has become, wrong; but a convincing demonstration of that should be required before abandoning a presumption that is an integral part of so many federal doctrines. The case for continuity in constitutional, and quasi-constitutional adjudication is a strong one, if only to avoid the inevitable confusions and costs of transitions in doctrinal regimes.

To require state courts to use federal procedures in adjudicating federal claims would impose some burden on both state court judges and lawyers to be familiar with federal rules of procedure. Mastering two systems of procedure is not, of course, impossible,⁸⁹ though the opportunities for litigation over what counts as procedure, and which rules to use when a complaint is amended to add, or drop, a federal claim, all suggest that the appealing simplicity of Professor Redish and Mr. Sklaver's proposal may be more theoretical than actual.⁹⁰ These

SYSTEM 576 (4th ed. 1996). *But cf.* *Felder v. Casey*, 487 U.S. 131, 150 (1988) ("Federal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'"). *Felder* involved a state rule that barred adjudication of plaintiffs' civil rights claims under 42 U.S.C. § 1983 (Supp. II 1996), a statute enacted pursuant to Congress' Fourteenth Amendment powers. It is possible that a different approach to the application of state procedural rules may be warranted in litigation involving those claims than in litigation involving statutes enacted under Article I powers, and that a different approach to procedural rules barring adjudication of affirmative claims than rules affecting defenses to such claims might be similarly supportable, *cf.* *Johnson v. Fankell*, 117 S. Ct. 1800 (1997) (refusing to require states to follow federal procedure of permitting interlocutory appeals of denials of qualified immunity defenses in section 1983 litigation).

89. Indeed, the federal courts relied for many years on separate systems of procedure for "law" and "equity," and in "law" cases were required generally to follow state rules of procedure. The complexities of this system, however, led to creation of the unified Rules of Civil Procedure, in part because of the unnecessary difficulty—and litigation—occasioned by the prior system. *See* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 462 (1942) (noting that a system of "divided procedure . . . is practically a bar at the outset to a truly simplified procedure"); Daniel J. Coquillette, *Scope and Purpose of Rules*, in JAMES WM MOORE, I MOORE'S FEDERAL PRACTICE §§ 1.02, 1 App. 01[2] (1998).

90. In the last two decades there has been an enormous proliferation of different local rules in the federal courts (through local rule-making, local options on discovery under the Federal Rules of Civil Procedure, and individual district civil management plans required by Congress). This proliferation has been widely criticized. *See, e.g.,* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995). Many have questioned whether some of the local rules are themselves in conformity with the Federal Rules of Civil Procedure. *See, e.g.,* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996); Peter J. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1663 (1995). This fragmentation of the federal procedural rules provides an added reason for caution in presuming that state courts should employ "federal procedures" in adjudicating federal claims. Determining what those procedures are may be difficult, and confidence that those procedures would be superior to those of the state courts for adjudicating substantive federal claims might be in question. *Cf.* Peters, *supra* note 80, at 1083-85 (arguing that state courts are sharing

difficulties may be compounded by the proposal being in the form of a presumption (which would permit litigation over when the presumption is overcome, e.g., do state courts have to follow federal court rules on paper size?).

While Professor Redish and Mr. Sklaver note “the inherently limited availability of Supreme Court policing of the state courts’ procedural choices in converse-*Erie* contexts” as a reason to mistrust case-by-case analysis as effective in assuring the supremacy of federal law,⁹¹ their Article does not identify large numbers of unresolved challenges to state courts failures to follow federal procedures in the adjudication of federal claims. It may be that lawyers’ learning that “you take the state courts as you find them,”⁹² for the purposes of adjudicating federal claims, is, notwithstanding important exceptions, so well established, that it does not occur to lawyers who have chosen to litigate in state courts to seek the use of federal procedures. I am not aware of recent evidence of a substantial problem of state court procedures (as compared to those in federal courts) systematically interfering with the enforcement of federal rights⁹³—other than in connection with the inadequate quality of representation afforded to indigent criminal defendants, including those charged with capital crimes.⁹⁴ Yet in the area of criminal procedure the Supreme Court has seemed critical of state courts for overprotecting federal rights of defendants. Absent evidence of problems of substantial magnitude in civil litigation, the transition costs of moving to a whole new system may not be justified by the putative benefits. And, transition costs aside, the costs of implementing the new approach are considerable, both in terms of ongoing litigation about what is covered by the rule and by what such a rule would preclude.

Moreover, there are positive benefits from procedural decentralization.⁹⁵

responsibility for protecting political and civil rights and can better do so if their procedural autonomy is strengthened).

91. Redish & Sklaver at 108.

92. See FALLON ET AL., *supra* note 88, at 576.

93. See, e.g., William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1700-12 (1992) (noting that state and federal procedural rules sometimes differ but that these differences had not impeded coordination of discovery in multi-forum litigations). *Id.* at 1724 (noting that “[O]ne might expect joint state-federal hearings to encounter insuperable problems because of differences in the rules or procedures of the state and federal courts. In fact, such problems have been rare.”). Although Professor Neuborne identified several areas in 1981 in which federal rules were better for constitutional rights claimants, see Neuborne, *supra* note 84, in some jurisdictions civil rights plaintiffs more recently seem to prefer to file in state courts. See, e.g., *Wisconsin Dep’t of Corrections v. Schacht*, 118 S. Ct. 2047 (1998); *Howlett v. Rose*, 496 U.S. 356 (1990).

94. See FALLON ET AL., *supra* note 88, at 1457 (explaining interest in proposals for habeas reform in state death penalty cases arising from many factors including “the poor quality of the representation [of death row inmates] often afforded at trial and on direct review” and discussing specific reform proposals).

95. Indeed, in recent years the benefits of decentralized procedures has seemingly played an important role in the federal courts themselves with the proliferation (many would say undue)

Pretrial conferences and process,⁹⁶ unified courts for specialized areas,⁹⁷ pay incentives for encouraging timely decisions,⁹⁸ juror selection to increase the representativeness of the jury,⁹⁹ use of cameras in the courtroom¹⁰⁰—these are all procedural developments in which state courts have played an important role. Some of the experiments (much modified) have over time been found beneficial (like the pretrial conference) and some have been met with more mixed evaluations (such as televising criminal proceedings). While Professor Redish and Mr. Sklaver's approach apparently carves out state criminal cases from the scope of the proposed rule, and would not extend it to cases raising purely state

of local rules that introduce complexities (if not technically disuniformity) to the practice under the Federal Rules of Civil Procedure. For discussion, see, e.g., Mullenix, *supra* note 90.

96. See Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 ALA. L. REV. 133, 160-65 (1997) (describing history of state court innovations in use of pretrial conferences).

97. See D.C. DOMESTIC VIOLENCE PLAN (Nov. 14, 1995) (100-page plan signed by representatives of community groups and relevant officials, including Chief Judge of Superior Court, Chief of Police, and U.S. Attorney, leading to creation of a unified domestic violence court in the District of Columbia); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System* (forthcoming 1999) (manuscript on file with author).

98. See LA. REV. STAT. ANN. 13: §§4207-10 (West 1991 & Supp. 1998) (requiring district court and city court judges to issue judgments within 30 days of the cases being submitted and providing for loss of one-quarter of their salary for each violation of timely decision requirement).

99. See Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 711 (1995) (noting that a number of state and local jurisdictions, including Arizona and Hennepin County, Minnesota, were considering different approaches to "affirmative action" in jury or grand jury selection). See also Jeff Barge, *Reformers Target Jury Lists*, A.B.A. J., Jan. 1995, at 26 (describing Arizona judge who empaneled three different juries for one case in order to have a jury that included Hispanic-Americans). Arizona has apparently taken a leading role among state courts in innovating procedures for jury trials in civil cases. See, e.g., ARIZ. R. CIV. P. 39(b)(10) (authorizing jurors to send questions to the judge to be asked of witnesses); ARIZ. R. CIV. P. 39(p) (authorizing jurors to take notes); ARIZ. R. CIV. P. 51(b)(3) (providing for jurors to receive copies of judges' instructions).

100. See Chief Justice Robert N. Wilentz, Speech Before the Middlesex County Bar Association (Nov. 14, 1979), reprinted in 49 RUTGERS L. REV. 763 (1997) (discussing New Jersey's experiments with television and still cameras in the courtroom); Susan E. Harding, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. CAL. L. REV. 827 (1996) (summarizing successful experiments in state courts, beginning with Florida in 1970s, and reporting that 47 states now permit some use of cameras in courtrooms, and arguing against federal practices prohibiting cameras in federal courtrooms). It was not until March, 1996 that the U.S. Judicial Conference voted permanently to authorize the federal courts of appeals to permit television, radio and still photography coverage of civil appeals in those courts. See Henry J. Reske, *A Repeat Performance: Judicial Conference Allows Cameras Back in Appeals Courts*, A.B.A. J., May 1996, at 38. The future of television coverage of civil cases in the district courts remains uncertain (although legislative authorization is pending).

law issues, it nonetheless would introduce constraints (including disincentives from limited judicial resources for procedural rules learning and innovation) that could considerably curtail these benefits of decentralization. And it would substantially eliminate the benefits of such state experimentation with procedures in the adjudication of federal civil claims.¹⁰¹

Finally, in light of the pervasiveness of the background rule that “federal law takes the state courts as it finds them”¹⁰²—a background rule reinforced by the Supreme Court’s rigorous support of state procedural rules that bar review of federal claims¹⁰³—one might be concerned about the question of legislative intent.¹⁰⁴ Elsewhere, Professor Redish has written powerfully on the usurpation of legislative authority involved in federal courts declining to exercise jurisdiction within the statutory limits conferred by Congress.¹⁰⁵ Congress is generally presumed to legislate against existing background rules, one of which has been that state courts will adjudicate cases generally in accordance with state procedural rules. Thus, the transition costs in terms of either dishonoring congressional intent, or of figuring out whether application of state procedural rules would be consistent with congressional intent, are substantial under Professor Redish and Mr. Sklaver’s proposed regime.

Moreover the Rules Enabling Act¹⁰⁶—which was the statute that in 1934 propelled the federal courts into wholesale rule-making for civil cases pending before them—arguably could be read by implication to express a congressional judgment that the federal courts should not, generally, make rules for the state courts. The statute in its current form authorizes the Supreme Court to “prescribe

101. For acknowledgment of the benefits to the federal courts of procedural experimentation in state court systems, see COMMISSION ON GENDER & COMMISSION ON RACE & ETHNICITY, REPORT OF THE THIRD CIRCUIT TASK FORCE ON EQUAL TREATMENT IN THE COURTS, *reprinted in* 42 VILL. L. REV. 1355, 1726 (1997) (noting state courts’ programs in improving court interpreter services which “offer valuable assistance and suggestions for federal courts as well”). *See also* Resnik, *supra* note 96 (noting state court contributions to development of pretrial practice). *Cf.* Chemerinsky & Friedman, *supra* note 90, at 789-91 (discussing possible benefits of procedural decentralization and experimentation by the different federal district courts but arguing that those benefits are not being realized with current proliferation of local federal rules that introduce unwarranted complexities into federal practice; favoring experimentation in limited number of districts under central control).

102. *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (Stevens, J., for a unanimous Court), (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)).

103. *See, e.g., Wainright v. Sykes*, 433 U.S. 72 (1977).

104. *Cf.* Redish & Muench, *supra* note 14, at 329-39 (arguing that whether state courts can hear federal causes of action depends on Congress’ intent and arguing in favor of a case-by-case approach to deciding whether state courts can exercise concurrent jurisdiction where Congress has not spoken clearly).

105. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

106. 28 U.S.C. §§ 2071-2077 (1994).

general rules of practice and procedure and rules of evidence *for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.*"¹⁰⁷ Federal law also provides that the "Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of *their* business."¹⁰⁸ This language does not appear to extend to an authority to prescribe rules of practice and procedure for cases in the *state* courts. Congress has also prescribed the procedures to be followed by the federal courts in proposing rules, a procedure that relies on U.S. Judicial Conference advisory committees consisting of "members of the bench and the professional bar, and trial and appellate judges," committees dominated by members of the federal bench.¹⁰⁹ In light of the absence of structural provisions for state participation, it seems implausible that the Federal Rules of Civil Procedure (even if they became models for adoption by the states) were intended *ipso facto* to apply in state court adjudications of federal claims.

III. FEDERALISM AND BRIGHT LINES

Professor Redish and Mr. Sklaver's argument for a presumption in favor of requiring federal rules of procedure in state court adjudication of affirmative federal claims implicitly draws on an important strand of constitutional thinking in recent years that has rejected "balancing" tests in favor of the greater certainty of bright lines and categorical rules.¹¹⁰ I want to say a few words here on the "benefits of balancing"—or more precisely, of avoiding "bright line rules" in favor of more contextualized decision-making.¹¹¹

107. *Id.* § 2072(a) (emphasis added).

108. *Id.* § 2071(a) (emphasis added).

109. *Id.* § 2073 (a)(2). See McCabe, *supra* note 90, at 1663-65 (noting that federal judges constitute about 50% of the members of the rules-related Advisory Committees to the Judicial Conference). According to McCabe, of the 77 positions on those committees concerned with rule-making, 38 were held by federal judges, 21 by private attorneys, 7 by law professors, 6 by Department of Justice lawyers, and 5 by state court chief justices. *Id.* at 1665 (Table).

110. Redish & Sklaver, *supra* note 1, at 104-05 (referring to "subjectivity," "vagueness" and "unpredictability" of "ad hoc balancing").

111. Redish & Sklaver characterize the Court's current approach to "converse-*Erie*" questions as inconsistently varying between strong presumptions that state rules control and some degree of "pro-federal" effort to require federal procedural rules to control state court adjudication. See *id.* at 101-02; see also *id.* at 106-07 (describing *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949) and *Felder v. Casey*, 487 U.S. 131 (1988) as reflecting a high degree of effort to prevent state court procedural rules from hindering effectuation of substantive federal policies). Query, though, whether it would be accurate to say that the Court has approached converse-*Erie* questions with a presumption that state courts control their own procedures, a presumption which has been more or less easily overcome by asserted federal interests, and that Redish & Sklaver want to substitute a different presumption, which, if adopted, might develop along similar lines in ways that would permit it to be more, or less easily, overcome by asserted state interests in avoiding "significant restructuring" of their systems. See *id.* at 101.

The arguments against “balancing” are several:¹¹² first, that the image of balancing conveys a delusional scientific weighing process; second, as Redish and Sklaver suggest, that balancing, multi-factored tests give too much discretion to courts and achieve too little predictability; and finally, that categorical rules, rather than balancing, accord more effective protection to important constitutional rights, such as the right of free speech. Professor Aleinikoff has eloquently argued that balancing metaphors “undermin[e] our usual understanding of constitutional law as an interpretive enterprise[,] . . . transforming constitutional discourse into a general discussion of the reasonableness of governmental conduct.”¹¹³ By contrast, categorical rules more effectively convey the importance of, for example, First Amendment values than do “balancing” tests, by emphasizing the strong presumption in favor of unfettered discourse and by casting permissible restraints as narrow “exceptions.” A further argument is that categorical rules are more likely to constrain results of other decision-makers, notably lower courts, than do balancing tests.¹¹⁴

Taking these objections in turn: I agree that the metaphor of balancing can convey an inaccurate image of scientific weighing. I prefer to think of the “balancing” process that goes on in constitutional adjudication, as in related forms of common law adjudication,¹¹⁵ as involving the application of legal judgment to legal problems. Treating balancing tests as analogous to scientific weighing is not intellectually honest—but neither is the reasoning that is offered in support of some categorical rules. Whether formulating a balancing approach, a “standard,” a multi-factored test or a categorical “rule,” the formulating court is often engaged in both balancing different kinds of claims and the exercise of judgment.

Now, as to the claims of predictability and discretion: In some sense it is right that a strong, clear presumption (here, to use federal procedures in state courts) is more likely to have predictable and constrained results than case by

112. For a still classic treatment, see T. Alexander Aleinikoff, *Constitutional Law In the Age of Balancing*, 96 YALE L.J. 943 (1987). Professor Aleinikoff is careful to distinguish “balancing,” as he critiques it in his article, from the use of multifactored analyses to engage in primarily analogical reasoning. *Id.* at 945. For present purposes, I am primarily concerned to contrast Redish and Sklaver’s arguments in favor of a relatively simple, clear rule with the benefits of a more contextualized case-by-case or issue-by-issue approach. While I greatly admire and generally seek to emulate Professor Aleinikoff’s carefulness, given my limited objective here, I may use the term “balancing” as shorthand here to suggest a wider array of approaches than his use of the term entailed.

113. *Id.* at 987.

114. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 520-35 (1988) (discussing formalism as linguistic limit on choice); see also Aleinikoff, *supra* note 112, at 948-63 (emphasizing relationship between formalism and categorical or conceptual approaches in contrast to functional pragmatism underlying balancing methodologies); .

115. See David Strauss, *Common Law Constitutional Adjudication*, 63 U. CHI. L. REV. 877 (1996).

case, or issue by issue analysis. The more factors that a court must evaluate and consider, the more places for the exercise of discretion and judgment. So it would seem.¹¹⁶ Yet I wonder whether it is the doctrinal test, or the stance of judicial deference vel non that determines application of the test to the facts. The “compelling interest” standard is, formally, a balancing test; yet it is widely believed to be highly predictive and constraining. But partly this is so because the courts have, generally, been quite limited in what interests they will recognize as compelling enough to overcome the protected right. In other words, there is little judicial deference to government claims of the need to regulate based on the content of speech, for example, or to discriminate based on race. While having a categorical rule may make a real difference, some of what people take to be the difference between balancing and categorical tests has more to do with the stance of deference adopted by the courts to the underlying subject matter.

Third, I agree that use of categorical rules can be more effective than balancing tests in giving rhetorical emphasis to particular constitutional values. Freedom of expression challenges under the First Amendment are often met by competing claims of interest that are not articulated as “rights” of comparable constitutional magnitude. The fundamental character of freedom of expression in maintaining other features of constitutional life may warrant a heavy thumb on the scale, or (in language Professor Aleinikoff might prefer) a more categorical approach to, for example, protection from prior restraints on speech.¹¹⁷

But in the area of judicial federalism it is far less clear to me than it is to Professor Redish and Mr. Sklaver which way fundamental values tilt. Both “litigant choice” and “intersystemic pollination,” two of the seven criteria for the allocation of jurisdiction discussed in Professor Redish’s 1992 article on the subject,¹¹⁸ would favor allowing state court procedural systems, generally, to

116. *But see supra*, note 29, and notes 89-90 and accompanying text (suggesting that Redish & Sklaver’s proposal might raise as many questions as it resolves).

117. *See generally* Aleinikoff, *supra* note 112, at 975-76 (criticizing balancing analysis in *Branzburg v. Hayes*, 408 U.S. 665 (1972), as depreciating First Amendment values). The rule against prior restraints of speech is widely regarded as an important categorical rule of United States law (and quite distinctive from the law of other nations). Yet it is a rule that may still require the exercise of complex judgment in determining what counts as a prohibited prior restraint and whether some exception (for example, where confidential information from government intelligence agencies is at issue) may apply. *Compare* *Snepp v. United States*, 444 U.S. 503, 509 n.3 (1980) (per curiam) (upholding enforcement of former CIA employee’s agreement not to publish information about the agency without obtaining prepublication clearance and rejecting his claim that the agreement was unenforceable prior restraint on protected speech), *with* *New York Times Co. v. United States*, 403 U.S. 713 (1971) (invalidating injunctions against publication of top-secret Defense Department study of Vietnam War obtained from former Pentagon employee because government had not met its burden of overcoming presumption of rule against prior restraints).

118. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between the State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1770 (1992).

apply in the adjudication of federal rights: both because having different procedural systems for vindication of federal rights expands the choice of litigants and because having state courts develop procedures for adjudication of federal rights might provide useful information to the federal system as a whole.

Thus, on this issue, I do not see with clarity how the interests in having federal rules of procedure applied in state courts for adjudicating federal claims is so fundamental a value as to warrant, by itself, the choice of a categorical rule.

One of the most compelling arguments against flexible balancing approaches and in favor of more rigid, categorical approaches is the argument developed by Professor Schauer and elaborated by Professor Mark Tushnet¹¹⁹ that the more formalistic approach of the latter may do a better job of constraining mistakes by other decision-makers—here, the state courts. In the absence of evidence of widespread confusion, or wasted time in litigating procedural issues, however, the concern about constraining behavior of the state courts would not seem to me to come strongly into play here.

Several benefits of “balancing,” or rather, for a more contextualized decision whether particular federal procedures should control in state court adjudications, might be advanced, or reaffirmed, here. First, a more contextualized approach provides a better opportunity to identify, and evaluate, the different interests at stake. Where there are competing interests of value, such a balancing process may yield better answers than a more categorical presumption. Second, a “balancing” process seems to me a more intellectually honest way to capture much judicial decision-making that occurs (even in the application of seemingly rigid categorical rules, where judicial judgment and discretion may be exercised at an earlier stage of classification and definition). Third, flexible, contextualized approaches may be more compatible with the insight that legal problems and rules are perceived very differently, and have different meanings and impacts, on different audiences; contextualized approaches may be more open to the multitude of perspectives that may inform decision-making about legal matters including procedure.¹²⁰ Fourth, contextualized balancing approaches can be tailored to offer more visible flexibility. This flexibility has two benefits. First, it affords more apparent doctrinal stability (though perhaps less predictability of results) because its flexibility allows it to be workable across a range of problems and outcomes.¹²¹ Second, where a problem is

119. Schauer, *supra* note 114, at 539-44 (discussing relationship of “ruleness” and predictability of decision); Mark Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1 (1996).

120. Cf. Kathleen Sullivan, *The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 56-95 (1998) (discussing different claimed benefits of “rules” versus “standards,” a dichotomy that roughly corresponds to “categorical tests” versus “balancing tests,” and noting in particular the ideological moderation which “standards” and “balancing” approaches permit on sensitive issues).

121. While predictability in legal decision-making is an important rule of law value, it is probably of greatest importance in identifying the rules for planned, primary out of court behavior, in contrast to rules about jurisdiction or procedure. See *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991); cf. *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring) (arguing that in

relatively new, and the correct solution somewhat uncertain, a rush to rigid rules seems less prudent than a more cautious, case-by-case approach.

Having said this, I also want to reiterate the caveat about placing too much reliance on the distinction between presumptions and "balancing," or more contextualized approaches to decision-making. Both categorical rules and balancing tests can be deployed in ways that accord greater, and lesser, deference to the decision-maker whose action is being reviewed. What may be just as, if not more, important than the doctrinal test is the judicial stance, or attitude, towards the importance of the relative interests involved. Professor Redish and Mr. Sklaver's proposal discounts the values of state procedure in the adjudication of federal claims, and thus offers little reason to defer to state court processes. I am less certain that this is always true, or true often enough to warrant Redish and Sklaver's presumption, and see more reason to be willing to defer.

CONCLUSION

While federal law is supreme, both the federal and the state governments are in some senses "subordinate sovereigns"—subordinated to the requirements of the Constitution for their behavior, and for their existence. To elevate the federal rules of procedure over those of the states in dealing with federal law is to presume that state courts have no sufficient investment in the proper adjudication of federal claims to warrant operation of normal state rules of procedure. This shift in the balance of judicial autonomy would be a substantial departure from existing practice, and one which has not thus far been justified by evidence of actual problems. Congress nonetheless has substantial power to determine that particular procedures must be employed to vindicate federal rights, which must be followed by state courts in entertaining federal actions. So I end, where I began, more in agreement than disagreement with Professor Redish and Mr. Sklaver's attention to Congress' enumerated powers as providing a constitutional basis for requiring state courts to entertain federal causes of action.

DISCOVERING THE IMPACT OF THE “NEW FEDERALISM” ON STATE POLICY MAKERS: A STATE ATTORNEY GENERAL’S PERSPECTIVE

JEFFREY A. MODISSETT*

INTRODUCTION

The phrase “new federalism” connotes an asserted reinvigoration of states’ rights by the U.S. Supreme Court and other institutions. The expected result is placement of substantive limits on the federal government’s exercise of power over states and individuals. New federalism, as it has developed over recent years, has two related strands: judicial and legislative. The judicial strand refers to constitutional limits that the U.S. Supreme Court has placed principally on federal congressional power over states. Recent decisions include *United States v. Lopez*,¹ *Printz v. United States*,² and *Seminole Tribe of Florida v. Florida*.³

The legislative strand involves a congressional about-face in rethinking the presumption that national problems require a solution initiated or controlled by the federal government. In just the last few years, for example, Congress has eliminated the federal welfare entitlement and permitted states to experiment with their own welfare systems. And although perhaps less sweeping than welfare reform, elimination of the mandatory federal sixty-five-miles-per-hour speed limit on interstate highways—leaving state legislatures to enact speed limits they deem appropriate—is an excellent doctrinal example of the legislative strand.⁴

Together the changes emanating from both strands represent a significant trend of shifting power from the federal government to the states. It is no coincidence that the judicial changes have occurred with a Supreme Court that includes five justices appointed by Presidents Reagan and Bush and William Rehnquist’s elevation to Chief Justice. The legislative changes likewise follow the 1994 Republican takeover of Congress. But beyond the jurisprudential importance of the Court’s decisions and the ideology of Congress’ cession of power are the practical consequences of those decisions and philosophies to state policy-makers. Is this shift a positive redistribution of power to a level of government closer to the people? Or, is it an abdication of responsibility by the

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1. 514 U.S. 549 (1995) (invalidating the federal Gun Free School Zones Act as beyond Congress’ commerce power).

2. 117 S. Ct. 2365 (1997) (invalidating portions of the Brady Bill commandeering state officials into federal service as violating the Tenth Amendment).

3. 517 U.S. 44 (1996) (holding that the federal courts lack jurisdiction to adjudicate certain claims brought by Indian tribes against unconsenting states).

4. National Maximum Speed Limit Act, 23 U.S.C. § 154, *repealed* by Pub. L. No. 104-59, 109 Stat. 577 (1995).

federal government to smaller governmental units unprepared to expend the significant effort and resources required to manage complex economic and social problems?

In my view, the devolution of federal power is generally a positive development. Too much, however, can be made of the supposed trend toward the new federalism. Not all of the federal government's relinquishment of power is progressive; not all of the power shifts that are progressive were initiated by the federal government; and the federal government continues to expand its power in some areas—at least formally. Thus, for state policy-makers, the practical effects of the new federalism must be measured in each discrete area of public policy.

As a state policy-maker and Indiana's chief legal officer, I have the opportunity to discover the impact of the new federalism in many areas of public policy. From that vantage point, I make four observations. First, an acute impact of the Supreme Court's new federalism is the live debate over Indian gaming among the competing sovereignties of states, Indian tribes, and the federal government. Second, the power shift from the national to state governments requires a determination of whether states, and more specifically state policy-makers, are prepared to take up the regulatory slack. If they are not, adjustments in state policy must be made—some quickly. Third, while the national government appears to continue attempting to expand its authority in some areas, upon closer analysis this ostensibly countervailing trend is more perception than substance. Real power is indeed shifting from the federal to state governments. Finally, offshoots of original concepts of federalism are at work today that fill gaps in federal exercise of power and fit well into the contemporary notion of expanded state powers.

I. INDIAN GAMING: AN AREA CLEARLY IMPACTED BY THE NEW FEDERALISM

Legal and illegal gambling are on the rise in the United States.⁵ In spite of, or perhaps because of, the rise in gambling, many states want the opportunity to prohibit or strictly regulate any further expansion of gambling within their borders. However, as applied to Indian gaming this becomes difficult because under federal law states have little say in, and almost no regulatory control over, Indian lands. In most cases, states have no criminal or civil jurisdiction over Indian lands. Regulation is left to tribal authorities and the federal government.⁶

Gaming on Indian lands is governed by the Indian Gaming Regulatory Act ("IGRA").⁷ IGRA has at least two important features that implicate states' rights. With some significant and controversial exceptions, Indian tribes cannot establish casino-style gambling and other games such as bingo, lotteries, and pull

5. See ROBERT GOODMAN, *THE LUCK BUSINESS* 2-3 (1995).

6. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

7. 25 U.S.C. §§ 2701-2721 (1994).

tabs on lands tribes acquired after October 17, 1988.⁸

Until October 1996, the U.S. Department of Interior ("Interior") took the position that states had no right to challenge judicially its decision to take land in trust for a tribe for gaming purposes. In classic "Catch-22" fashion, Interior argued that a land-acquisition decision was not ripe for challenge by a state until the land was actually acquired, and once the land was acquired, the decision was unreviewable under the federal Quiet Title Act.⁹ Interior maintained that untenable position until it reached the U.S. Supreme Court in *Department of Interior v. South Dakota*.¹⁰ Interior then did an about-face, quickly promulgating rules that provided for judicial review, thus mooting the case.¹¹ Justice Scalia, for one, signaled his displeasure at Interior's strategic maneuvering at the state's expense.¹²

In some instances, federal law purports to require states to negotiate a compact with a tribe that intends to conduct gaming on Indian land.¹³ A state that negotiates a compact with a tribe may try to obtain some regulatory power and fees or taxes. But what if the state refuses to negotiate a gaming compact or the state and the tribe cannot agree to terms? Until March 1996, it was thought that IGRA itself solved this problem by permitting tribes to sue states in federal district court.¹⁴ However, in *Seminole Tribe of Florida v. Florida*,¹⁵ the U.S. Supreme Court held that provision of IGRA unconstitutional.¹⁶ The Court held that Congress could not, under the Eleventh Amendment, use its Indian Commerce Clause power to haul non-consenting states into federal court.¹⁷

In the wake of *Seminole Tribe*, Interior is in the process of promulgating rules for approval and enforcement of gaming compacts in which states are deemed to have refused to bargain in good faith.¹⁸ In short, Interior appears to be taking the position that the executive branch may do what the Eleventh Amendment prohibits federal courts from doing: forcing a gaming compact on an unconsenting state. Last year, Congress placed a moratorium on consideration of most tribal-state gaming compacts because of Interior's threat to administratively adjudicate whether a state had negotiated in "good faith" and design a gaming compact accordingly.¹⁹ In June 1998, I signed a letter with

8. 25 U.S.C. § 2719 (1994).

9. 28 U.S.C. § 2409a (1994).

10. 519 U.S. 919 (1996) (mem.).

11. *Id.* at 920 (Scalia, J., dissenting); 25 C.F.R. § 151.12 (1998).

12. *Department of Interior*, 519 U.S. at 921. Justice Scalia characterized Interior's legal position as follows: "'Heads I win big,' says the Government; 'tails we come back down and litigate again on the basis of a more moderate Government theory.'" *Id.*

13. 25 U.S.C. § 2710(d)(3)(A) (1994).

14. 25 U.S.C. § 2710(d)(7) (1994).

15. 517 U.S. 44 (1996).

16. *Id.*

17. *Id.* at 53-71.

18. See 63 Fed. Reg. 3289-01 (Jan. 22, 1998).

19. That moratorium will expire at the end of the 1998 federal fiscal year. See Pub. L. No.

twenty-four other state attorneys general objecting to Interior's proposed rulemaking arguing in part that the Secretary of Interior lacks power to circumvent *Seminole Tribe's* prescription of Eleventh Amendment immunity.

Whatever the outcome of the sovereignty battles between states, tribes, and the federal government, it is clear that the Supreme Court's *Seminole Tribe* decision and the Eleventh Amendment principles that underlie it form the backdrop for resolution of the issues.²⁰ Thus, in this area, the new federalism (as propounded by the Court) does impact state policy-makers in a direct and continuing way.²¹

II. CAN STATE POLICY MAKERS FILL THE VOID NEW FEDERALISM CREATES?

One major trend in federal-state relations over the last decade is the shift of power from the federal government to the states in several areas of substantive policy, including welfare reform and, to a lesser extent, environmental enforcement. This trend is a challenge to states, especially "small-government" states like Indiana, to find the best solutions for these problems that our national government has been unable to solve.

In the welfare-reform arena, the federal government has largely ended the cookie-cutter approach of prescribing national standards for administering the primary program for assistance to families, Aid to Families with Dependent Children ("AFDC").²² Now, it sends block grants to states to develop their own programs. While the new federal Temporary Assistance for Needy Families ("TANF")²³ legislation does establish some standards—including five-year time-limit and work requirements—states are free to spend the block grants in a variety of ways: for direct payments to families, child care subsidies, and

105-83, 111 Stat. 1543, 1569 (1997). Congress has considered, but not passed, a moratorium specifically tailored to Interior's proposed post-*Seminole* regulations. See Sen. Amend. No. 2133, S. 1768, 144 Cong. Rec. S2553-02 (March 25, 1998).

20. Cf. *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (action by tribe against state was in nature of quiet title action, was barred by Eleventh Amendment, and did not fall within *Ex Parte Young* exception).

21. We also face other aspects of Eleventh Amendment jurisprudence on a routine basis. In fact, over the past year, my office authored two *amicus curiae* briefs involving federal jurisdiction and Eleventh Amendment issues in the U.S. Supreme Court. In both cases, the Court accepted our positions and reached "pro-state" results. See *International College of Surgeons v. City of Chicago*, 118 S. Ct. 523 (1997) (federal court may exercise supplemental jurisdiction over state claims calling for deferential review of administrative decision); *Wisconsin Dep't. of Corrections v. Schacht*, 118 S. Ct. 2047 (1998) (state defendants may remove entire cases to federal court even when one or more claims in a case is barred by the Eleventh Amendment). In both cases, we argued that a proper view of federalism places states, as litigants, on par with other litigants regarding removal jurisdiction under 28 U.S.C. § 1441 (1994).

22. 42 U.S.C. § 601 (Supp. II 1996).

23. 42 U.S.C. § 603 (1994 & Supp. II 1996).

education and training.²⁴

Under this initiative, states have been successful in moving families off welfare rolls, but the evidence is more mixed about states' successes in actually assisting families in moving out of poverty. Several recent studies show that many families are not economically better off under the current welfare reform even though they are no longer receiving benefits.²⁵ This may be a warning sign that some states are not prepared to handle the complex issues arising from the shift of responsibility for administering welfare from the federal government to the states.

In the area of environmental law, the Environmental Protection Agency also has given the states a good deal more flexibility and freedom in enforcing the federal environmental laws that have been a primary tool for regulation in states like Indiana.²⁶ The rhetoric in environmental enforcement always has been that the states will accomplish it with loose supervision from Washington, but lately this philosophy has become more of a reality. While Washington sets the broad goals, states are given a good deal of freedom in determining how to meet the goals.

With the freedom, and often the responsibility, to make policy in these areas, an important question is whether states are up to the task. Indiana, for example, prides itself on its citizen-legislature, and our legislature remains part-time. It could be argued that Indiana and some other states have been able to maintain part-time legislatures because Congress, with its enormous staff and research capabilities, has sifted the data, done the research, and written the law in so many areas. I am not advocating that the Indiana General Assembly dramatically increase its staff and research budget or that it become a full-time body as a reaction to new federalism. But, I am raising the question, as Congress diminishes its welfare-administration and environmental enforcement responsibilities to name two, whether states are prepared to make the increasingly complex and sophisticated policy judgments the new federalism requires.

My concern has multiple layers. If some states cannot keep up with the demands of these new responsibilities, even more power will be ceded to special interests who have resources in those states. Special interest groups, it seems, always have data and they always have influence.²⁷ Just look at the continued

24. *Id.*

25. Compare Ken Ellingwood & Virginia Ellis, *After Welfare, Low Wages Remain a Stubborn Fact*, L.A. TIMES, Feb. 8, 1998, at A30, and Judith Havemann, *Study Praises Oregon Welfare Reform Results*, WASH. POST, June 24, 1998, at A3, with Barbara Vobejda, *Welfare Reform in Minnesota Reduces Poverty*, WASH. POST, Aug. 28, 1997, at A14.

26. See, e.g., Clean Air Act Amendments 1990, P.L. 101-549, 104 Stat. 2399 (codified as amended at scattered sections of 42 U.S.C. §§ 7400-7699) (allowing choice of methods to meet federally-set clean air standards).

27. The Indiana Lobby Registration Commission reports that the number of lobbyist has increased steadily over the last few years. The number of compensated lobbyists has increased from 632 in 1995 to 653 in 1996 to 676 in 1997. Half-way through the 1998 reporting year, there were 636 compensated lobbyists. The trend is the same for employer lobbyists.

success of the tobacco lobby in many state legislatures despite strong public sentiment against them.²⁸ If the Indiana General Assembly has to assume responsibility for crafting welfare or environmental policy, but their own legislative staff and other government agencies are not able to give the General Assembly the information it needs, interest groups will have even more influence in promoting their agendas. This phenomenon will likely be especially evident in areas like telecommunications and utility deregulation, where the industries are well stocked with information *and* influence.

The shift of power to the states also raises questions about public scrutiny and involvement. My office has been active in ensuring that Indiana's laws requiring open meetings and access to records are followed and enforced.²⁹ When policy-making is done in a single location, it is easy for national media to focus on and scrutinize that policy-making. Most national news organizations have large staffs in Washington covering Congress, the White House, and even the regulatory agencies. When policy-making is dispersed, news media are challenged to make sure that they follow what is happening in fifty state capitals among fifty legislatures and countless state agencies.³⁰

With policy-making shifting to the states, it is even more important for the media to ensure vigilantly that decisions are subject to public scrutiny. The media will have to become more sophisticated in following the debates that take place in the halls of the legislature as well as administrative developments in the hundreds of regulatory agencies in each state.³¹ Unless the media live up to this challenge, public involvement in and scrutiny of important decisions will fall unacceptably short.³²

28. The Indiana General Assembly, for example, overrode then-Governor Evan Bayh's veto of a bill, popularly known as S.B. 106, that preempts local governments from regulating the sale, distribution, and display of cigarettes. See IND. CODE ANN. §§ 16-41-39-1 to -3 (West Supp. 1998). It is one of the tobacco industry's perpetual goals to have laws made at the "highest" level of government.

29. See Indiana Open Door Law, IND. CODE ANN. §§ 5-14-1.5-1 to -8 (West 1989 & Supp. 1998); Indiana Access to Public Records Act, IND. CODE ANN. §§ 5-14-3-1 to -10 (West 1989 & Supp. 1998); Kyle Niederpruem, *The State of Secrecy*, INDIANAPOLIS STAR, Feb. 22, 1998, at A1.

30. The American Journalism Review has completed a comprehensive and striking study of the decrease in media resources expended on state governments at the same time those governments have become more important decision-makers. See Charles Layton & Mary Walton, *Missing the Story at the Statehouse*, AM. JOURNALISM REV., July/August 1998, at 43. This fascinating study validates the existence of the link between the new federalism, the increased importance of state government in the daily lives of citizens, and the need for greater media coverage of state-house issues. *Id.* at 46.

31. Layton and Walton demonstrate that there are fewer reporters covering state houses and that increasingly the reporters that do lack significant experience. *Id.* at 44, 52.

32. According to Layton and Walton, Indiana has experienced a decrease, as many states have, in print media resources directed at state-house coverage. *Id.* at 60.

III. OSTENSIBLE AGGRANDIZEMENT BY THE FEDERAL GOVERNMENT AND THE ECHO EFFECT

In the criminal-law area, federal statutory authority has been increasing. Congress has been expanding the federal criminal code to cover more criminal conduct such as carjacking,³³ and has expanded the number of federal homicides subject to the death penalty.³⁴ But do these federal statutes really amount to a federalization of criminal law? And is this federalization a rebuttal to the premise of new federalism?

Upon closer scrutiny, a good argument can be made that these new federal laws create more image than substance. Despite this increased federal statutory authority, the federal government continues to play a limited role in investigating and prosecuting criminal defendants in Indiana. By comparing the number of criminal filings in state and federal court and the number of state and federal law enforcement officers in Indiana, it is obvious that day-to-day law-enforcement activity remains primarily a state and local function. Almost all criminal offenders in Indiana are arrested by local or state law enforcement; if convicted, they are sentenced before state judges;³⁵ if the sentence is suspended, they are placed on county probation;³⁶ if the sentence is executed, they are sent to state prison and eventually released from state prison to state parole.³⁷

Today, there are approximately 3000 federal criminal laws on the books covering more criminal offenses than ever before.³⁸ In recent years, Congress has been expanding the federal criminal code to punish not just crimes on government property or affecting interstate commerce but conduct already criminalized by the states. The Federal and Indiana criminal codes have concurrent jurisdiction over many crimes including nonsupport of a child,³⁹ auto theft,⁴⁰ arson,⁴¹ and various drug⁴² and gun offenses.⁴³

This dual sovereignty over criminal offenses has created an overlap in jurisdiction and blurred lines of demarcation for federal and state investigators. As Marion County Prosecutor from 1991 through 1994, I filed criminal charges

33. 18 U.S.C. § 2119 (1994 & Supp. II 1996).

34. 18 U.S.C. § 3592(c)(1) (1994 & Supp. II 1996).

35. IND. CODE ANN. § 35-50-1-1 (West 1998).

36. IND. CODE ANN. §§ 11-13-1-1 to -10 (West 1982 & Supp. 1998).

37. IND. CODE ANN. §§ 11-13-3-1 to -10 (West 1982 & Supp. 1998); IND. CODE ANN. § 35-50-6-1 (West 1998).

38. See Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 251 (1997).

39. 18 U.S.C. § 228 (1994 & Supp. II 1996); IND. CODE ANN. § 35-46-1-5 (West 1998).

40. 18 U.S.C. § 2119 (1994); IND. CODE ANN. § 35-43-4-2.5 (West 1998).

41. 18 U.S.C. § 844 (1994 & Supp. II 1996); IND. CODE ANN. §§ 35-16-1-1 to -3 (repealed 1976).

42. 18 U.S.C. § 922 (1994 & Supp. II 1996); IND. CODE ANN. §§ 35-48-1 to -7 (West 1998).

43. 18 U.S.C. § 921 (1994 & Supp. I 1995 & Supp. II 1996); IND. CODE ANN. § 35-47-2-3 (West 1998).

for state-law violations that federal agents investigated. Drug Enforcement and U.S. Customs agents made arrests for state drug crimes. U.S. Postal Inspectors and U.S. Treasury agents filed state charges of forgery and fraud on a financial institution in state court. The FBI even provided some assistance to my office with a prominent rape investigation, prosecution, and conviction. We had federal and local law-enforcement officers working side by side on a drug task force and on a fugitive-warrant team.

Now, as Attorney General, I oversee state investigators who ferret out fraud in the federal Food Stamp and Medicaid programs.⁴⁴ These state investigators have not been subject to a *Printz*-like⁴⁵ commandeering by the federal government to perform this function. The federal government provides adequate funding for the investigators, which my office accepts with due appreciation.

Despite the expanded scope of the federal criminal code and the dual jurisdiction of federal and state authorities, criminal enforcement in Indiana remains primarily a state and local function. This can be determined by comparing the number of state and federal criminal cases filed, and the number of state and federal law-enforcement officers serving in Indiana. In 1997, nearly 50,000 felony criminal cases were filed in Indiana state courts,⁴⁶ while only 367 criminal cases were filed in Indiana's two federal courts.⁴⁷ Since 1986, the number of state felony cases filed has risen steadily from 35,000 to 50,000.⁴⁸ Indiana courts have also seen increased filings in misdemeanor cases and juvenile delinquencies. The number of federal criminal cases filed in Indiana on the other hand has not risen or kept pace with the number of state cases filed. The period between 1995 and 1997 showed the fewest criminal filings in Indiana federal courts than in any other three year period since 1986.⁴⁹

In 1997, Indiana employed 11,000 state and local full-time police officers.⁵⁰ In 1996, there were 74,500 full-time federal law enforcement officers, only 629 of whom were assigned in Indiana, and only 288 of those federal law-enforcement officers assigned in Indiana had police-response and criminal-

44. See 7 U.S.C. § 2020 (1994 & Supp. II 1996) (transferring administration of food stamp program to state); IND. CODE ANN. § 4-6-10-1 to -3 (West 1991 & Supp. 1998) (outlining the Medicaid Fraud Control Unit); IND. CODE ANN. §§ 12-13-7-1 to -2 (West 1994) (empowering Family and Social Services Administration's Division of Family and Children ("DFC") to administer food stamp program). The Attorney General's office enforces food stamp fraud by agreement with DFC.

45. See *Printz v. United States*, 117 S. Ct. 2365 (1997).

46. See SUPREME COURT OF INDIANA, DIVISION OF STATE COURT ADMIN., VOL. I 1996 JUDICIAL REPORT (1996) [hereinafter SUPREME COURT OF INDIANA].

47. See ADMINISTRATIVE OFFICE OF U.S. COURTS, STATISTICS DIV., TABLE D-3, "CASES, U.S. DISTRICT COURTS" (1986-1996) [hereinafter ADMINISTRATIVE OFFICE OF U.S. COURTS].

48. See SUPREME COURT OF INDIANA, *supra* note 46, at 62-63.

49. See ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 47.

50. See INDIANA LAW ENFORCEMENT TRAINING BD., INDIANA LAW ENFORCEMENT DEPARTMENTS AND OFFICERS (1997).

investigation duties.⁵¹

The federal government always has been, and continues to be, proficient at passing laws, collecting statistics, garnering publicity, and handing out money (not necessarily in that order). Indeed, in the area of law-enforcement policy, the federal government influences Indiana with policy initiatives tied to federal spending. The Indiana Criminal Justice Institute⁵² reports that the federal government provided over \$32 million in grants, awards, and agreements for criminal-justice programs.⁵³ The funding includes money for crime-victim assistance, victim-compensation benefits, violence-against-woman programs, traffic safety, juvenile programs, and criminal-history improvement. The level of funding has increased each year since 1994.⁵⁴ President Clinton's law-enforcement policy initiative to use federal funding to put additional police on the streets has funded 673 additional police officers for 212 state and local police agencies in Indiana. Echoing this policy initiative of providing funding for additional police officers, Indiana Governor Frank O'Bannon created the Law Enforcement Assistance Fund.⁵⁵ State money from this fund has paid to hire, train, and equip 453 new police officers for 328 law-enforcement agencies through grants from the Indiana Criminal Justice Institute.⁵⁶

In the area of criminal procedure, Indiana's rules and statutes are very different from federal criminal procedures. Indiana prosecutors can charge any crime by information or grand-jury indictment.⁵⁷ Indiana rules and statutes vary from federal procedure on speedy trials,⁵⁸ discovery,⁵⁹ sentencing,⁶⁰ credit time,⁶¹ post-conviction relief,⁶² and the appellate process.

Even though state criminal laws and procedures often differ significantly from federal, one incident of increased federal power in this century has been a focus on federal constitutional rights almost to the exclusion of state-created rights. In many states, including Indiana, the development of state constitutional

51. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, *FEDERAL LAW ENFORCEMENT OFFICERS*, 1996 (1996).

52. IND. CODE ANN. §§ 5-2-6-1 to -16 (West 1989 & Supp. 1998).

53. See INDIANA CRIMINAL JUSTICE INST., *FEDERAL GRANTS, AWARDS AND AGREEMENTS* 3 (1998) (on file with the author).

54. See *id.* at Table, FFY 1994-1997.

55. IND. CODE ANN. §§ 5-2-13-1 to -10 (West 1997 & Supp. 1998).

56. See Governor Frank L. O'Bannon, Press Release (Sept. 26, 1997).

57. See IND. CODE ANN. § 35-34-1-1 (West 1986 & Supp. 1994).

58. Compare IND. CRIM. RULE 4, with 18 U.S.C. §§ 3161-3174 (1994).

59. Compare IND. R. CIVIL P. 26-37, with FED. R. CIVIL P. 26-37; IND. R. CRIM. P. 2, with FED. R. CRIM. P. 16-17.

60. Compare IND. CODE ANN. § 35-50-2 (West 1998), with 18 U.S.C. §§ 3551-94 (1994 & Supp. II 1996) (federal sentencing guidelines).

61. Compare IND. CODE ANN. § 35-50-6-3 (West 1998), with 18 U.S.C. § 3624(b) (1994 & Supp. II 1996).

62. Compare IND. R.P.P.C. 1-2, with 28 U.S.C. § 2254 (1994 & Supp. II 1996) (rules governing *habeas corpus* cases in federal district court).

law has slowed accordingly. In recent years, the Indiana Supreme Court has purposefully encouraged a reinvigoration of state constitutional analysis.⁶³

Interestingly, however, even after independent state constitutional analysis, Indiana courts largely follow federal constitutional analysis concerning the rights of the accused. This does not signal a lack of commitment by the Indiana Supreme Court in examining the Indiana Constitution's bill of rights. Rather, it is an unsurprising result considering that the state and federal constitutions codify rights that serve the same goals and values⁶⁴ and that the drafters of the 1851 Indiana Constitution convened to reform the legislative and financial processes of state government and did not focus on the rights of the accused.⁶⁵

In search-and-seizure cases, Indiana courts apply an independent reasonableness standard in evaluating the legality of police conduct.⁶⁶ Despite this separate state reasonableness test, Indiana decisions are consistent with United States Supreme Court search-and-seizure decisions in:

- *Terry v. Ohio* for stop and frisks;⁶⁷
- *Minnesota v. Dickerson* in plain-feel cases;⁶⁸
- *Whren v. United States* for pretext stops;⁶⁹
- *Rakas v. Illinois* for standing;⁷⁰
- *Nix v. Williams* on inevitable discovery;⁷¹
- *New York v. Belton* on search of a car incident;⁷²
- *Pennsylvania v. Mimms* on removal of a driver from a car after a traffic stop;⁷³
- *Maryland v. Wilson* on removal of a passenger from a car after a traffic stop;⁷⁴

63. See Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

64. See Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U.L. REV. 421, 441 (1996).

65. See *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296, 299-300 (Ind. 1994); *Ajabu v. State*, 693 N.E.2d 921, 930 n.10 (Ind. 1998).

66. See, e.g., *Ben-Yisrayl v. Indiana*, 690 N.E.2d 1141, 1152 (Ind. 1997); *Haley v. Indiana*, 696 N.E.2d 98, 102-03 (Ind. Ct. App. 1998).

67. 392 U.S. 1 (1968); *Wilson v. State*, 670 N.E.2d 27 (Ind. Ct. App. 1996); *State v. Joe*, 693 N.E.2d 573 (Ind. Ct. App. 1998).

68. 508 U.S. 366 (1993); *Burkett v. State*, 691 N.E.2d 1241 (Ind. Ct. App. 1998).

69. 517 U.S. 806 (1996); *State v. Voit*, 679 N.E.2d 1360 (Ind. Ct. App. 1997).

70. 439 U.S. 128 (1978); *Cox v. State*, 392 N.E.2d 496 (Ind. Ct. App. 1979); *Porter v. State*, 570 N.E.2d 1324 (Ind. Ct. App. 1991).

71. 467 U.S. 431 (1984); *Banks v. State*, 681 N.E.2d 235 (Ind. Ct. App. 1997).

72. 453 U.S. 454 (1981); *Mitchell v. State*, 690 N.E.2d 1200 (Ind. Ct. App. 1998); *State v. Lamar*, 680 N.E.2d 540 (Ind. Ct. App. 1992).

73. 434 U.S. 106 (1977); *Young v. State*, 564 N.E.2d 968 (Ind. Ct. App. 1991); *Warr v. State*, 580 N.E.2d 265 (Ind. Ct. App. 1991).

74. 117 S. Ct. 882 (1997); *Banks v. State*, 681 N.E.2d 235 (Ind. Ct. App. 1997).

- *California v. Greenwood* on searches of curbside trash;⁷⁵
- *Florida v. Rodriguez* on consensual encounters;⁷⁶ and
- *Hodari v. California* on seizure.⁷⁷

Even though the Indiana Supreme Court extensively analyzed the state Constitution on the privilege of self-incrimination, the court upheld the legality of a confession following the result and logic of the 1986 United States Supreme Court decision in *Moran v. Burbine*.⁷⁸ The Indiana Supreme Court also decided recently that Indiana should continue to follow the federal standard for retroactivity of new rules of constitutional law.⁷⁹

In sum, states do the Yoeman work in law enforcement, but find themselves looking to the federal government for policy guidance and money. And while the Indiana Supreme Court is aggressive about interpreting the state Constitution, it most often parallels the analysis of the federal Constitution. Therefore, neither the expanded federal power over crime nor the independent state constitutional analysis, practically speaking, have produced significant change in the state law-enforcement arena. Thus, the trend toward the new federalism has not altered the balance of federal-state power in this area.

IV. A PROMISE OF ORIGINAL FEDERALISM REALIZED (OR THE REVERSE ECHO EFFECT)

One of the promises of federalism is the value of states as laboratories of experimentation.⁸⁰ In short, subject to the federal Supremacy Clause, each state may exert its sovereign power as it chooses. States may choose different means to regulate common ends, or they may regulate different ends altogether. Varied demographic, cultural, philosophical, geographic, or experiential influences will produce varying regulation. Over time, a state will be able to look to its sister states' regulatory approaches and results when implementing or evaluating its own systems.

As discussed above, the federal government has often led states in legislating criminal law, while states do the bulk of the law-enforcement work. Sometimes, I have observed, states "echo" federal criminal legislation by enacting an offense or set of criminal laws first developed or implemented by the federal government. This influence of the federal government over matters traditionally within state

75. 486 U.S. 35 (1988); *Moran v. State*, 644 N.E.2d 536 (Ind. 1994).

76. 467 U.S. 1 (1984); *Molino v. State*, 546 N.E.2d 1216 (Ind. 1989).

77. 497 U.S. 621 (1991); *Wilson v. State*, 670 N.E.2d 27 (Ind. Ct. App. 1996).

78. 475 U.S. 412 (1986); *Ajabu v. State*, 693 N.E.2d 921 (Ind. 1998).

79. *State v. Mohler*, 694 N.E.2d 1129 (Ind. 1998) (following *Teague v. Lane*, 489 U.S. 288 (1989), and its federal progeny).

80. "Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment." *New State Ice Co. v. Liebmann*, 285 U.S. 282, 311 (1932) (Brandeis, J., dissenting).

purview has marked the post-New Deal era. In addition to the criminal law, for example, states have adopted their own versions of federal statutes in areas such as labor relations,⁸¹ civil rights,⁸² and environmental law.⁸³

As we conclude the twentieth century, however, the opposite dynamic is at work. States are taking the initiative to analyze and attempt to solve problems that the federal government has declined to address. For example, as discussed above, welfare reform as a concrete plan of action—as opposed to a vague attack on liberalism—finds its antecedents in several state experiments, the most well-known being the “Wisconsin Works” or “W2” workfare program developed by Wisconsin Governor Tommy Thompson.⁸⁴

More recently, it is the state tobacco litigation that provides the best example of state-initiated reform achieving national results or, to put it another way, the best example of the “echo effect” in reverse. Mike Moore, the attorney general of Mississippi, filed the first state tobacco lawsuit in May 1994.⁸⁵ The suit was brought by a state attorney general, in state court, based solely on state-law theories.⁸⁶ Soon, other states filed their own similar suits.⁸⁷ Early in the Mississippi litigation, General Moore and others asked the U.S. Department of Justice to join the tobacco litigation by becoming a party in the existing cases, by filing suit separately in the name of the United States, or—at the very least—by assisting the states in their suits. The Justice Department declined and elected instead to sit on the sidelines; therefore, the states went it alone.⁸⁸ Eventually, forty-one states and Puerto Rico filed lawsuits against the tobacco industry.⁸⁹ All but two were filed in state court and, overwhelmingly, the suits are proceeding under state-law causes of action.⁹⁰

81. See, e.g., IND. CODE ANN. § 22-7-1-2 (1991) (providing workers the right to select a bargaining representative; stating expressly to construe in conjunction with the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994)).

82. See, e.g., *id.* §§ 22-9-2-1 (Supp. 1998) (age discrimination); 22-9-5-1 (Supp. 1998) (disability discrimination).

83. See, e.g., *id.* § 13-25-4-8 (Supp. 1998) (imposing liability under state law for violations of federal environmental statute, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 (1994 & Supp. II 1996)).

84. See Brian Louis, *Wisconsin: Welfare Reform, Abortion Restrictions Top Legislative Session*, WEST'S LEGAL NEWS, May 30, 1996, available in 1996 WL 28173, at *1.

85. *Moore v. American Tobacco Co.*, No. 94-1429 (Jackson Cty. Ch. Ct. May 1994).

86. *Id.*

87. Minnesota was the second state to file its suit on August 17, 1994. See *Minnesota v. Philip Morris, Inc.*, C1-94-8565 (2d Jud. Dist. 1994), *aff'd in part, rev'd in part*, 551 N.W.2d 490 (Minn. 1995). On August 22, 1998, Nebraska became the forty-second jurisdiction (including Puerto Rico) to file suit. See *Sternberg v. R.J. Reynolds*, District Court Lancaster County Docket 573 (1998), at 277.

88. See *Maryland Asks Federal Court to Remand Medicaid Reimbursement Action*, MEALEY'S LITIG. REP.: TOBACCO, July 3, 1996, at 12.

89. See *id.*

90. Indiana's lawsuit, for example, was filed in state court and pleads all state-law claims.

On June 20, 1997, the state attorneys general completed the historic tobacco settlement and forwarded it to Congress for consideration. Each participating state, while not necessarily agreeing with all the details of the settlement, willingly found itself in a consortium of sister states constituted to produce a common result. Together, state attorneys general proposed terms of settlement, consulted with public-health groups, advised their governors and state legislators, devised a system for allocating settlement proceeds, and tried to provide Congress and the White House the incentive to pass the deal. Moreover, states have provided valuable assistance to each other in the litigation as it continues to move forward in each state while the proposed settlement has been pending in Congress.⁹¹

Congress has balked at enacting the tobacco settlement into law. Although politics has played a major role, many of the stumbling blocks to the legislation involve compensation for the federal government and the nuances of federal regulatory regimes.⁹² Mississippi, on the other hand, with a trial date imminent and not having the luxury to wait for congressional action, entered into its own settlement with the industry in July 1997.⁹³ Florida and Texas followed with their own settlements as trial dates approached in their cases.⁹⁴ The State of Minnesota became the first state to actually go to trial, settling the case just as the decision was put in the jurors' hands.⁹⁵

And what was the federal reaction to the individual settlements? The Department of Health and Human Services effectively placed a Medicaid lien on states' settlement proceeds before the ink was dry on the tobacco industry's checks.⁹⁶ For perhaps the first time, the federal government has its hands out for a piece of a pie cooked up by the states.

The state tobacco litigation shows state initiative at work. It is initiative that might or might not be caused or furthered by the new federalism. But regardless, in the coming years, it will likely not be a singular instance of state-initiated

See Modisett v. Philip Morris, Inc., No. 49D07-9702-CT-236 (Marion Super. Ct. Oct. 28, 1997) (second amended complaint).

91. *See Separate Miss. Settlement Possible, But Parties Still Readying for Trial*, MEALEY'S LITIG. REP.: TOBACCO, July 3, 1997, at 23.

92. Reports abound about the tobacco industry's media campaign against the leading tobacco reform legislation—the McCain Bill—and the industry's continuing influence over Congress. *See, e.g.*, David E. Rosenbaum, *Tobacco Bill Killed on Procedural Votes in Senate*, N.Y. TIMES, June 18, 1998, at A1. This underscores the influence that interest groups like the tobacco industry may exert at the state level.

93. *See Just Days Before Trial, Mike Moore, Tobacco Firms Reach \$3 Billion Deal*, MEALEY'S LITIG. REP.: TOBACCO, July 17, 1997, at 3.

94. Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 469 (1998).

95. *See Tobacco Companies to Pay Minnesota, Blue Cross \$6.6 Billion Plus Fees*, MEALEY'S LITIG. REP.: TOBACCO, May 21, 1998, at 3.

96. *See Robert Kruger, Paying a Medicaid Lien After Cricchio v. Pennisi*, N.Y. ST. B. J., Dec. 1997, at 58.

reform or litigation even for problems national in scope.⁹⁷

CONCLUSION

As a state policy-maker, I welcome the challenge of the "new federalism." The devolution of power to states creates an opportunity for initiatives and innovations if states are prepared and assertive in meeting the responsibility of power. But bringing decisions closer to the voters could create problems if states are unprepared and passive in facing the new federalism challenge. With power comes the responsibility to act with resolve, intelligence, and care.

97. See Layton & Walton, *supra* note 30, at 46 (listing several "national" problems state attorneys general have tackled in the absence of federal enforcement).

CONGRESSIONAL FEDERALISM AND THE JUDICIAL POWER: HORIZONTAL AND VERTICAL TENSION MERGE

W. WILLIAM HODES*

At a symposium on national power and state autonomy,¹ held in the beautiful chamber of a State House of Representatives, it is fitting that we have heard a lot of talk about federalism from the vantage point of the state governments and the state courts. We have had panels on the role of the Supreme Court in shaping state autonomy² and on the federal government's possible ability to commandeer not just the state bureaucracy but the state courts.³ State court judges asked questions and made comments from the floor. Our luncheon speaker was the State Attorney General,⁴ speaking in the same vein and from the same baseline.

The final panel of the symposium, however, is on federalism from the vantage point of *Congress*, featuring a presentation by Professor Ronald Rotunda of the University of Illinois College of Law,⁵ with commentary by Professor Saikrishna Prakash,⁶ visiting at the same school.

"Federalism from the vantage point of Congress" is actually a misstatement of the topic—a misstatement I made deliberately, because the process of correcting it can shed some light on the true subject of the inquiry. In my view, thinking about "congressional federalism" actually requires us to think less about what the federal *Congress* is up to, and more about what the federal *courts* are up to. This is symbolized by the very title of Professor Rotunda's paper, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of*

* Professor of Law, Indiana University School of Law—Indianapolis. This Essay is an extension of remarks I made at the symposium that forms this issue of the *Indiana Law Review*, introducing the talk by my friend and former colleague, Ron Rotunda. I would like to thank Karen Butler Reisinger for her thoughtful and painstaking work filling in the holes that I had left in the manuscript. Without meaning to, she transformed herself from Executive Managing Editor to Research Assistant, and back again.

1. Symposium, *National Power and State Autonomy: Calibrating the New "New Federalism,"* 32 IND. L. REV. 1 (1998).

2. See John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 10 (1998); see also Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" But Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11 (1998); S. Elizabeth Wilborn Malloy, *Whose Federalism?*, 32 IND. L. REV. 45 (1998).

3. See Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71 (1998); see also Vicki C. Jackson, Printz and Testa: *The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111 (1998).

4. Jeffrey A. Modisett, *Discovering the Impact of the "New Federalism" on State Policy Makers: A State Attorney General's Perspective*, 32 IND. L. REV. 141 (1998).

5. Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998).

6. Saikrishna Prakash, *A Comment on Congressional Enforcement*, 32 IND. L. REV. 193 (1998).

Boerne v. Flores.⁷ His paper is nominally about the powers of Congress, to be sure, but the inquiry concerns those powers *as governed by a recent decision of the United States Supreme Court*. And that is the essence of these introductory remarks: exercise of national government power viz-a-viz the states—federalism—cannot be divorced from the duel among the branches of the national government as to how those powers will be exercised and by whom—a question of separation of powers. The two doctrines merge and become indistinguishable.

In law school Constitutional Law courses, students are typically taught to think of federalism as an exercise in hydraulics. The federal government as a whole is portrayed as a large vertical piston, pressing inexorably downwards to squeeze out most state power and most state autonomy.⁸ The piston sometimes meets with resistance, of course, and sometimes the piston is pushed or drawn back up a notch or two, but we all know how the story must end. The Supremacy Clause⁹ allows Congress to preempt and displace considerable state law, so long as Congress acts properly within the scope of one of its enumerated powers, especially its power under the Commerce Clause.¹⁰ And despite a nip here and a tuck there, that scope is broad.¹¹ The same Supremacy Clause, in tandem with

7. Rotunda, *supra* note 5.

8. See JERRE S. WILLIAMS, CONSTITUTIONAL ANALYSIS IN A NUTSHELL, 145-82 (West 1979). This short treatise features a series of diagrams, mapping out possible vertical and horizontal allocations of power.

9. U.S. CONST. art. VI, cl. 2.

10. See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). With respect to the Commerce Clause, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (finding that Congress has no power to prohibit interstate shipment of goods produced by child labor), with *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*), and *Wickard v. Filburn*, 317 U.S. 111 (1942) (finding that Congress may regulate local economic activity that, in the aggregate, can affect interstate commerce in non-trivial ways).

11. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court, for the first time since the New Deal, invalidated a federal statute on the ground that Congress had exceeded its power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 2. By a 5-4 vote, the Court struck down portions of the Gun-Free School Zones Act, 18 U.S.C. § 922(q) (1994), making it a federal crime to possess a firearm within 1000 feet of a school facility (without any showing that the firearm had earlier moved in interstate commerce). *Lopez*, 514 U.S. at 551.

Lopez may have established that there is a limit to congressional power under the Commerce Clause, but that power is hardly moribund. *Lopez* did not, for example, call into question any federal statute that directly regulates interstate commerce, the interstate traffic in goods, or the sale of goods for which there is a large interstate market. Since *Lopez* was decided, there have been thousands of federal prosecutions for illegal possession—not just sale—of narcotics and firearms. Moreover, *Lopez*-based challenges to the Drug-Free School Zones Act, 21 U.S.C. § 860(a) (1994), which prohibits possession of illegal drugs within 1000 feet of a school facility have routinely been rejected. See, e.g., *United States v. Jackson*, 111 F.3d 101 (11th Cir.) (pointing out that every Circuit to face the issue has so ruled), *cert. denied*, 118 S. Ct. 200 (1997).

the Fourteenth Amendment,¹² allows the federal courts to dictate the terms upon which states will operate virtually all of their public institutions, from public schools¹³ and mental institutions¹⁴ to public employment¹⁵ to the civil and criminal justice systems themselves.¹⁶ There is also the Full Faith and Credit

The federal arson statute has routinely been applied, at least where the premises in question are business or commercial properties, and thus “affect” interstate commerce, even if only in the aggregate. *Compare* *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) (finding that statute may not be applied to arson of a private residence, merely because it received natural gas from an out-of-state source), *cert. denied* 118 S. Ct. 1328 (1998), *with* *United States v. Gomez*, 87 F.3d 1093 (9th Cir. 1996) (finding that arson of any business property is activity substantially affecting interstate commerce). A statute that is more problematic on Commerce Clause grounds, the Violence Against Women Act, Pub. L. 103-22, 108 Stat. 1902 (1994) (codified at scattered sections of 16 U.S.C., 18 U.S.C. and 42 U.S.C.), will no doubt eventually be tested in the Supreme Court. *See* *United States v. Gluzman*, 154 F.3d 49 (1998) (upholding conviction under 18 U.S.C. § 2261(a) of a woman who crossed state lines with her lover to murder her husband); *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997), (reinstating complaint under 42 U.S.C. § 13981 of a college student who was raped by other students), *reh'g en banc granted, opinion vacated* Nos. 96-1814, 96-2316 (Feb. 5, 1998).

12. U.S. CONST. amend. XIV.

13. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (finding that denial of free public education to children of “undocumented” illegal aliens violates the Fourteenth Amendment); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that de jure segregation of public school children by race violates the Fourteenth Amendment). *But see* *Missouri v. Jenkins*, 515 U.S. 70 (1995) (finding that federal court has no authority under Fourteenth Amendment to order funding of enrichment programs designed to raise black student achievement levels to national norms, absent showing that existing achievement levels were attributable to prior de jure segregation).

14. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that the Fourteenth Amendment requires state to provide minimally adequate care to involuntarily committed retarded persons to ensure their safety and freedom from undue restraint, but professional employees have considerable discretion in judging proper course of care); *Addington v. Texas*, 441 U.S. 418 (1979) (holding that Fourteenth Amendment requires proof by clear and convincing evidence before state may involuntarily commit persons with mental disorders).

15. *Compare* *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (finding that the Fourteenth Amendment requires that state employees subject to termination only for cause must be given “some kind of hearing,” including a pretermination hearing that need not be elaborate), *and* *Perry v. Sindermann*, 408 U.S. 593 (finding the policies and practices of a public university may create a property interest in reemployment that is entitled to protection under the Fourteenth Amendment), *with* *Board of Regents v. Roth*, 408 U.S. 564 (1972) (finding that the Fourteenth Amendment creates right to “some kind of hearing” to protect property rights, but nontenured teacher ordinarily does not have a property interest in reemployment).

16. There are too many areas of the law—let alone cases—for meaningful citation. Every case on personal jurisdiction, for example, from *Pennoyer v. Neff*, 95 U.S. 714 (1877), forward could be cited, as could every case involving either the death penalty or the procedural rights of criminal suspects or defendants generally.

Clause,¹⁷ which allows both the Congress and the Supreme Court to dictate to the state courts on matters of interstate preclusion.¹⁸

But all is not lost for the states, because there is some upward pressure on the piston as well, as I already mentioned. The federal government is a government of broad but nonetheless limited powers, and the Tenth Amendment¹⁹ at a minimum reserves to the states the powers not granted to the central government and prevents the national government from “commandeering” the resources and processes of the state governments.²⁰ And the doctrine of sovereign immunity, whatever its true source,²¹ ensures that in many situations the states of the United States are safe from being sued in federal court against their will.

Because federalism evokes the images of a hierarchy and of a piston pressing downward or being pushed back up, the whole area is often referred to as one of “vertical tension,” as Professor Torke mentioned in his overall introduction to the symposium.²² But that is only part of the story. Law students are also told about “horizontal tension” as well, namely separation of powers and checks and balances disputes between and among the three branches of the federal government. For example, the President—whether he be Richard Nixon or William Jefferson Clinton—must learn the extent of his amenability to suit and to subpoena *from the courts*.²³ The Congress and the President must wait until

17. U.S. Const. art. IV, § 1.

18. See, e.g. *Estin v. Estin*, 334 U.S. 541, 545-46 (1948) (stating that the Full Faith and Credit Clause is a constitutional command that replaces earlier principles of comity; as a consequence, states are no longer independent sovereigns in the same sense as before adoption of the Constitution); *Williams v. North Carolina*, 317 U.S. 287, 301-02 (1942) (ruling that North Carolina must recognize validity of Nevada divorces of two North Carolina citizens who took up residence in Nevada, and may not declare their subsequent remarriage to each other bigamous).

See also 28 U.S.C. § 1738 (1994).

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id.

19. U.S. CONST. amend. X.

20. See *Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992).

21. Compare *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (opinion of Rehnquist, C.J.), with *id.* at 76 (Stevens, J., dissenting), and *id.* at 99 (Souter, J., dissenting). See also *Hans v. Louisiana*, 134 U.S. 1 (1890); THE FEDERALIST NO. 81, at 414 (Alexander Hamilton) (Garry Wills ed., Bantam 1982) (stating that a State’s immunity from suit “is the general sense and the general practice of mankind”).

22. James W. Torke, *Enumerated and Reserved Powers: The Perpetually Arising Question*, 32 IND. L. REV. 3, 3 (1998).

23. See *Clinton v. Jones*, 117 S. Ct. 1636 (1997) (finding a sitting President amenable to suit by private citizen in federal court for pre-election conduct); *United States v. Nixon*, 418 U.S. 683 (1974) (finding that executive privilege is constitutionally based, but is outweighed by the need for

the Supreme Court speaks, to learn whether the Legislative Veto or the Line Item Veto procedure will stand or fall.²⁴ And of course if the courts—even the Supreme Court—misinterpret a federal civil rights law, the Congress and the President may pass new legislation that makes the courts' rulings obsolete.²⁵

The final topic of the symposium presents a graphic illustration of another outstanding feature of Constitutional Law that is also often taught in law schools, but that is even more clearly evident in practice. The grandest constitutional struggles and puzzles are the ones in which horizontal tension merges with vertical tension. In other words, the national players are never so seriously engaged in combat with each other, or at least in earnest dialog, as when they are discussing how the states will be dealt with, *and which branch of the federal government will do the dealing*.

I will give three quick examples of this merging of horizontal and vertical constitutional tension, and then launch Professor Rotunda to discuss what is perhaps the most dramatic and significant example of all—the duel between Court and Congress over the power of Congress to take unfriendly action against the states pursuant to Section 5 of the Fourteenth Amendment.²⁶

As a first example, consider *Erie Railroad Co. v. Tompkins*.²⁷ At first glance, it appears to be a classic case of “pure” federalism, involving vertical tension only. There is and can be no *federal* law governing the duty owed to pedestrians trespassing upon a railroad's right of way, the Supreme Court seemed to be saying, whether that law is embodied in a federal statute or in common law doctrine developed by the federal courts. There is no horizontal tension, because there is nothing for Congress and the federal courts to fight about; they are equally impotent with respect to such inherently local regulations. But later observers saw more layers of complexity.²⁸

“everyman's evidence” in an ongoing criminal case).

24. Both fell. The first in *INS v. Chada*, 462 U.S. 919 (1983), the other after the symposium, in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

25. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at scattered sections of 29 U.S.C. and 42 U.S.C.), *superseding* *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. A.T. & T. Techs., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

26. U.S. CONST. amend. XIV, § 5. See Rotunda, *supra* note 5.

27. 304 U.S. 64 (1938).

28. One of the most satisfying exchanges in all of legal scholarship was led off by Professor John Hart Ely, who had served as law clerk to Chief Justice Earl Warren during the Term that Warren had written the opinion for the Court in *Hanna v. Plumer*, 380 U.S. 460 (1964). In order, the pieces are: John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) [hereinafter *Myth of Erie*]; Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); John H. Ely, *The Necklace*, 87 HARV. L. REV. 743 (1974); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974).

In the first article in this series; Professor Ely noted (as had the opinion in *Hanna*) the fact that in addition to the Rules of Decision Act, 28 U.S.C. § 1652 (1994), that was center stage in *Erie*,

For one thing, there *was* a federal statute in play, the Rules of Decision Act,²⁹ which *directed* the federal courts to apply *state* law. Perhaps, then, *Erie* was simply the Supreme Court chastising itself for many years of wrongful violation of a valid federal statute—a statute *explicitly* addressing which of the federal branches would control relations with the states after all! If so, horizontal tension has not only re-entered the picture, but threatens to dominate the conversation.³⁰ Or perhaps the interplay between vertical and horizontal tension was even more complex than that. *Erie* involved an *interstate* railroad, it should be remembered, and there is little doubt that today Congress could regulate safety and just about every other aspect of its operation, including liability to trespassing pedestrians. Does *Erie* thus really mean to say that there are certain areas in which Congress can replace state law, *but the federal courts cannot*?! If so, *Erie* has almost become a pure separation of powers case rather than a pure federalism case. Or, at a minimum, it has become a case in which the vertical *merges* with the horizontal.

As a second example, consider the “dormant,” or “negative,” Commerce Clause. From the beginning, and without any prompting by Congress, the Supreme Court has consistently read into the Clause a negative implication restricting the states’ freedom of action, thus pushing the piston downward a few notches.³¹ The structure of the Constitution itself, the Court often said, prohibits

federal courts are bound to apply valid rules of procedure that have been promulgated according to the protocol set forth in the Rules Enabling Act, 28 U.S.C. § 2072 (1994). *Myth of Erie*, *supra*, at 698. Thus, when state law is accorded more (or less) deference in the federal courts, it is in large part *congressional* deference. In the last article, Professor Mishkin argued that federal courts generally lack the power to create federal common law (absent congressional authorization) because of ordinary separation of powers concerns. Mishkin, *supra*, at 1682. See also Henry Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

29. 28 U.S.C. § 1652 (1994) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

30. For a spirited debate about the separation of powers issues (or lack thereof) in *Erie*, see Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity*, 78 MICH. L. REV. 311 (1980); Martin H. Redish, *Continuing the Erie Debate: A Response to Westen & Lehman*, 78 MICH. L. REV. 959 (1980); Peter Westen, *After “Life for Erie”—A Reply*, 78 MICH. L. REV. 971 (1980). Similarly, compare Martin H. Redish, *Federal Common Law Political Legitimacy and the Interpretive Process: An Institutional Perspective*, 83 NW. U. L. REV. 761 (1989), with Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989), and Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853 (1989), with Louise Weinberg, *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860 (1989). See also George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229 (1992).

31. See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 454-59 (1992) (finding that Oklahoma statute requiring electric utilities in the state to burn a coal mixture containing at least 10% Oklahoma-mined coal violates the dormant Commerce Clause); *Kassel v. Consolidated Freightways*

states from raising trade barriers within the United States, and from discriminating against out-of-state commercial actors.³²

But starting around the turn of the Century, and gathering speed after the New Deal, Congress began to “authorize” or “ratify” interstate discrimination by the States that the Court, acting according to its own dormant Commerce Clause precedents, would have struck down.³³ How is this possible? If it is “unconstitutional” for a state to raise a tariff against out-of-state goods, or to impose an embargo on local goods, how can a mere statute—even a federal statute—change this result? Has *Marbury v. Madison*,³⁴ that preeminent case resolving horizontal tension in favor the courts, suddenly been overruled or nullified?

The answer that is now generally accepted³⁵ is that state action that is

Corp., 450 U.S. 662, 671 (1981) (finding that Iowa law prohibiting use of long trucks commonly used in adjoining states is a burden on interstate commerce and violates the dormant Commerce Clause); *Dean Milk Co. v. Madison*, 340 U.S. 349, 353 (1951) (finding that a local Wisconsin ordinance imposing conditions on sale of milk produced more than five miles from city violates the dormant Commerce Clause).

32. The best and the best known justification for the Supreme Court’s assertion of its own power to police the dormant Commerce Clause is found in Justice Jackson’s opinion for the Court in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-35, 539 (1949):

While the Constitution vest in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action. . . . [T]his Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution. . . .

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

33. Compare *Leisy v. Hardin*, 135 U.S. 100 (1890) (Iowa statute prohibiting the sale of beer unconstitutional as applied to beer brewed in Illinois and sold in Iowa in its original kegs), with *In re Rahrer*, 140 U.S. 545 (1891) (Congress has power to pass the Wilson Act making liquor subject to local laws even if sold in original packages; resulting prosecution under Kansas law did not violate dormant Commerce Clause). See also *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 654-55 (1981) (relying on *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946), and holding that in the McCarran Act, Congress had validly authorized discriminatory state taxes that would otherwise have been unconstitutional under the dormant Commerce Clause):

34. 5 U.S. (1 Cranch) 137 (1803).

35. In this little corner of constitutional law, the best explanations are to be found in the scholarly literature, not in the opinions of the Supreme Court. See William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Dilemma*, 35 STAN. L. REV. 387 (1983) (relying in part on Noel T. Dowling, *Interstate Commerce and State Power—Revised Version*, 47 COLUM. L. REV. 547 (1947), and Noel T. Dowling, *Interstate*

“unconstitutional” under the dormant Commerce Clause is only presumptively unconstitutional, in the absence of congressional authorization. The power of Congress under the Clause is capacious enough to include the power to grant such authorization. The details of the argument are not important, of course, for present purposes. What is important is that the focus has shifted suddenly, from a vertical duel between the federal and state governments about economic discrimination across state lines, to a duel between two branches of the federal government, *about the status and power of the states*.

Third, consider a feature of state sovereign immunity that Professor Rotunda will touch upon in his talk.³⁶ The Supreme Court has long held that although state government immunity from suit in the federal courts is at least in part dictated by *constitutional* concerns, Congress may in some circumstances “strip” the states of that defense. For a time—ending only a few years ago—the Court told Congress that it had to be unusually explicit in announcing that it indeed wished to subject the states to suit in federal court. It had to make what the Court called a “clear statement” to that effect, with the emphasis on clarity.³⁷ Today, Congress cannot strip the states of sovereign immunity if acting under the Commerce Clause, no matter how clear its statement of intent to do so³⁸—its “stripping” operation is limited to situations invoking the federalizing power of the Fourteenth Amendment.³⁹ But the point is already made: Congress may still take certain actions viz-a-viz the states, *but only upon terms dictated by the Supreme Court*.

A fourth and most outstanding example of the merger between horizontal and vertical tension in Constitutional Law is the subject of Professor Rotunda’s talk—congressional action regulating the states pursuant to Section 5 of the Fourteenth Amendment. The theme is the same: Congress has broad power to press the piston down on the states or to ease up, but Congress must go about its work under the supervision of the federal courts. The vertical merges with the horizontal yet again.

In listening to Professor Rotunda’s presentation, in reading his article, or in considering this kind of constitutional puzzle generally, be alert for phrases such as “the Constitution prohibits Congress from doing X or Y to the states.” When you encounter such phrases, fasten your seatbelts, because of course “the Constitution” cannot actually prohibit anything. The Court is the one doing the prohibiting, claiming to speak in the name of the Constitution.

Commerce and State Power, 27 VA. L. REV. 1 (1940)); see also Laurence Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

36. Rotunda, *supra* note 5, at 169.

37. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989), *overruled by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

38. See *Seminole Tribe*, 517 U.S. at 62-73.

39. See *id.* at 65; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Quern v. Jordan*, 440 U.S. 332, 342-44 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

THE POWERS OF CONGRESS UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT AFTER *CITY OF BOERNE V. FLORES*

RONALD D. ROTUNDA*

INTRODUCTION

If there is a recurrent theme in constitutional politics, it is this: The federal government, in the course of more than two centuries, has consistently sought to impose more control over the states.² In some cases, the exercise of this federal power is now well-recognized and, although its wisdom is subject to a great deal of debate, its exercise raises few constitutional objections under modern cases.

One useful tool that the federal government has is its spending power. Congress, in effect, bribes the states to take some action. For example, Congress orders the states to set up an unemployment fund that meets certain criteria, or Congress will impose various taxes on the state's citizens.³ Or, if the states do not raise the legal drinking age for alcoholic beverages from eighteen to twenty-one years of age, Congress will withhold some federal funds used for highway construction.⁴ Or, the states will receive certain monetary incentives *if* they provide for disposal of radioactive waste generated within their borders.⁵

The Spending Clause power is indeed useful, but it has its limits. Congress must have money to give the states in order for the "bribe" to work. If Congress is not supplying the money, there is nothing for Congress to withhold. Because the spending power requires the expenditure of federal funds, that power has a built-in, inner political check⁶ that places some, albeit minor, limits on the reach of federal power.

Consequently, Congress has often turned to the Commerce Clause.⁷ Congress, for example, may tell the states, "accept this highway money if you promise to pay your highway patrolmen at least the minimum wage." However,

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2. John C. Calhoun, well over a century ago, predicted that "Congress will inevitably be captured by a self-interested 'federal majority.'" William T. Mayton, "*The Fate of Lesser Voices*": *Calhoun v. Wechsler on Federalism*, 32 WAKE FOREST L. REV. 1083, 1083 (1997).

3. See *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

4. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

5. See *New York v. United States*, 505 U.S. 144 (1992).

6. Cf. Ronald D. Rotunda, *The Doctrine of the Inner Political Check, the Dormant Commerce Clause, and Federal Preemption*, 53 TRANSP. PRAC. J. 263, 266, 269 (1986) (commenting that courts interpret the dormant Commerce Clause to promote interstate commerce; when state rules affecting interstate commerce impose equal burdens on intra-state commerce, the court is more deferential to state power because of a political check by the voters within the state who directly bear the burdens).

7. U.S. CONST. art. I, § 8, cl. 3.

it is much simpler—and there is no budgetary consequence—for Congress simply to require the state “to pay your highway patrolmen and other state employees the Federal minimum wage if these workers are in, or can affect, interstate commerce.”⁸ Under an expansive concept of the doctrine—that interstate commerce includes intrastate commerce which “substantially affects”⁹ interstate commerce¹⁰—virtually all state workers are likely to be in, or to affect, interstate commerce.

While the law in this area has shifted a bit in recent times, it is now clear that Congress can impose the minimum wage on many such state employees *as long as* Congress imposes the same requirements¹¹ on non-state employees who are

8. Congress cannot simply deem or announce that a class of workers are in interstate commerce. The courts make the final determination if a class of workers are in, or affecting, interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 559-60 (1995); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

9. *See Lopez*, 514 U.S. at 559; *see also Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) (stating that “Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.”), *overruled on other grounds by National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision). *National League of Cities* was itself overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). *See Vicki C. Jackson, Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2195 (1998).

10. *Cf. Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (stating that Congress’ Commerce Clause power “extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power”) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

11. Since 1938 Congress has regulated employment conditions of workers in or affecting interstate commerce. Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201-219 (1994)). The original law specifically excluded states and their political subdivisions from its coverage. *Id.* § 3(d) (“‘Employer’ includes . . . but shall not include the United States or any state or political subdivision of a state”). In 1974, that statutory exclusion was repealed. Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 58, § 6(a)(1) (codified as amended at 29 U.S.C. § 203 (1994)). This amendment changed the original § 3(d) to read,

“Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Id. Two years later, *Wirtz*, 392 U.S. at 200, rejected any Tenth Amendment defense and held that it was constitutional for Congress to set the wages, hours, and working conditions of state employees. Only Justice Douglas, joined by Justice Stewart, dissented. Justice Douglas found the law to be a “serious invasion of state sovereignty protected by the Tenth Amendment” and “not consistent with our constitutional federalism.” *Id.* at 201. He objected that Congress, using the broad commerce power, could “virtually draw up each State’s budget to avoid ‘disruptive effect[s]’” on interstate commerce. *Id.* at 205. Congress could end up setting the wages of state governors. *See generally* Thomas H. Odom & Gregory S. Feder, *Challenging the Federal Driver’s*

also in, or affecting, interstate commerce. In other words, Congress can regulate the states via the Commerce Clause if it imposes requirements on the states that are “generally applicable,” that is, if equal burdens are imposed on private employers.¹²

Congress, for example, could not impose a minimum wage on the state governor, state legislators, or state judges, because these state workers have no private counterparts; the law would not be “generally applicable.”¹³ Even if certain state workers are in, or affecting, interstate commerce, Congress cannot impose on the states any restrictions that single out state employees because such laws would not be generally applicable. However, in general, Congress could impose a minimum wage on construction workers in, or affecting, interstate commerce even if some of those workers are state employees.

In short, there are important limits on the power of the federal government to commandeer the state legislature or state executive branch officials for federal purposes. To a certain extent, the Constitution itself forbids Congress from

Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment, 53 U. MIAMI L. REV. (forthcoming Oct. 1998) (article portends the result in *Condon v. Reno*, No. 97-2554, 1998 WL 559659, at *1 (4th Cir. Sept. 3, 1998), which held that Congress violated the federalism values of the Tenth Amendment when it enacted the Driver’s Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (1994 & Supp. II 1996)); Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289 (1984).

In 1976, in *National League of Cities*, 426 U.S. at 854-55, the Supreme Court overruled *Wirtz* and held that the Tenth Amendment forbade Congress from regulating the states in this way. In *Garcia*, 469 U.S. at 557, the Court (again, 5-4 decision) reconsidered *National League of Cities* and overruled it. See the thoughtful discussion by William W. Van Alstyne, *The Second Death of Federalism*, 85 MICH. L. REV. 1709 (1985).

There matters stood until *New York v. United States*, 505 U.S. 144, 178 (1992), which held that the Federal Government cannot authorize Congress to “command a state government to enact state regulation.” (emphasis added). Congress has the “power to regulate individuals, not States.” *Id.* at 165. Using the Commerce Clause, Congress may regulate interstate commerce directly; it may not “regulate state governments’ regulation of interstate commerce.” *Id.* at 166. The federal government may not “conscript state governments as its agents.” *Id.* at 177.

New York made some important distinctions. Federal courts may order state officials to comply with federal law because the Constitution provides that the judicial power extends to all cases arising under the Constitution. “No comparable constitutional provision authorizes Congress to command state legislatures to legislate.” *Id.* at 179. Many federal laws do affect state governments, but all “involve congressional regulation of individuals, not congressional requirements that States regulate.” *Id.* at 178. Finally, the Court clarified that it did not question “the authority of Congress to subject state governments to *generally applicable laws*.” *Id.* at 160 (emphasis added).

12. The *New York* decision “is not a case in which Congress has subjected a State to the same legislation applicable to private parties.” *New York*, 505 U.S. at 160.

13. There may also be other constitutional limitations on the power of Congress to directly regulate a state and its sovereign officers, but such arguments are outside the scope of this paper.

imposing unfunded mandates on state officials.¹⁴ Congress can “bribe” the states (that costs money), but Congress cannot simply order the states to take care of a problem.¹⁵

From the perspective of the President or Congress, the commerce power is preferable to the use of the spending power because commerce power does not require the use of federal funds. However, under the commerce power, Congress must impose similar restrictions on private individuals and entities, or otherwise the federal regulation is not “generally applicable.”¹⁶ In addition, there is another problem with using the commerce power—it does not override the Eleventh Amendment. To that topic we now turn.

I. THE ELEVENTH AMENDMENT

The Eleventh Amendment provides, “The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹⁷ This provision—and the case law interpreting it—acts as a bar to suits brought against state governments in federal court, when anyone other than the federal government or another state brings suit.¹⁸ This bar applies to all types of suits for damages or retroactive relief for past wrongs.

It is not unusual for the Supreme Court or commentators to refer to the Eleventh Amendment as a jurisdictional bar; however, this term is not strictly correct, because states can waive their Eleventh Amendment immunity.¹⁹ A true

14. See *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997) (finding the Necessary and Proper Clause itself a limitation on Congress’ power to commandeer state officials to carry out the laws of the United States).

15. See Erick M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENTARY 355 (1998). See also Ronald D. Rotunda, *Resurrecting Federalism Under the New Tenth and Fourteenth Amendments*, 29 TEX. TECH L. REV. 953 (1998).

16. See the thoughtful discussion in Thomas H. Odom, *The Tenth Amendment after Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657 (1987).

17. U.S. CONST. amend. XI.

18. While the Amendment only purports to bar citizens of *other* states or foreign nationals from suing a state, the Supreme Court has held that, by implication, it also bars suits by citizens of the defendant state. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

19. E.g., *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (express waiver); *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184 (1964) (abrogated by legitimate act of Congress), *overruled on other grounds by Welch v. Texas Dep’t of Highways & Public Transp.* 483 U.S. 468, 478 (1987).

The complex law surrounding the Eleventh Amendment is discussed in 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.12 (West Pub. Co., 2d ed. 1992). In addition, there has been extensive academic commentary in the wake of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), discussed below.

jurisdictional limitation (such as the requirement of diversity of citizenship, the requirement that the amount in controversy exceed a certain figure, or a requirement that the case “arise under” the Constitution, laws, or treaties of the United States) is not waivable. But the bar of the Eleventh Amendment may be waived. Like the requirement of personal service of process, the Eleventh Amendment is designed to protect the states. States, then, may waive that protection.

The “state” for purposes of the Eleventh Amendment includes all agencies of the state, with the exception of its political subdivisions, such as cities and school boards.²⁰ Therefore, the Bar Examining Authority of each state, for example, should be treated as the state for purposes of the Eleventh Amendment. Since the Bar Examiners are instrumentalities of the state supreme court,²¹ and the state supreme court is just as much a representative of the “state” as the executive and legislative branches, the Bar Examiners then should be under the protection of the Eleventh Amendment²² unless there is some exception applicable.

If a valid federal law or the U.S. Constitution requires or forbids certain actions, the Eleventh Amendment does not authorize the states to violate the Constitution. This is because the Eleventh Amendment does not override the Supremacy Clause.²³ But if the suit to enforce those rights is brought against the state, it cannot be filed in federal court.

While this jurisdictional restriction is important, it is hardly a complete preclusion of a remedy. First, the state may consent to be sued in federal court. Second, and even more important, the Eleventh Amendment does not bar suits brought against state officials who are sued in their *personal capacity*.²⁴ Federal courts can enjoin these state officials sued in their personal capacities, or require that these officials personally pay damages. The state acts through its flesh and blood agents. The Eleventh Amendment grants them no immunity from damages or injunctive relief in a federal action if they are sued in their personal capacities

20. See *Maybanks v. Ingraham*, 378 F. Supp. 913 (E.D. Pa. 1974) (city); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (school board).

21. For example, many cases conclude that setting the qualifications for members of the bar, admitting applicants, and denying applicants, are all judicial acts, entitling the state officials to absolute judicial immunity. See *Sparks v. Character & Fitness Comm. of Ky.*, 859 F.2d 428, 431-32 (6th Cir. 1988) (finding bar admission responsibilities a judicial act); *Connecticut Bar Examining Comm. v. FOIC*, 550 A.2d 633, 635 (1988) (finding that bar admission is analogous to adjudication); *Anonymous v. Connecticut Bar Examining Comm.*, No. CV94-0534160-5, 1995 WL 506660, at *4-5 (Conn. Super. Ct. Aug. 17, 1995) (finding state bar admission committee part of a judicial process).

22. Cf. *Thiel v. State Bar of Wis.*, 94 F.3d 399, 402 (7th Cir. 1996) (holding a state bar immune from suit under the Eleventh Amendment); *Crosetto v. State Bar of Wis.*, 12 F.3d 1396, 1402 (7th Cir. 1993), *cert. denied*, 511 U.S. 1129 (1994) (holding a state bar immune from suit under the Eleventh Amendment).

23. U.S. CONST. art. VI, cl. 2.

24. See *Ex parte Young*, 209 U.S. 123, 148 (1908).

and are, therefore, asked to pay damages from their own funds (even if these state officers are acting under color of law). In the beginning of this century, the Court held that the Eleventh Amendment did not bar an action in federal court seeking to enjoin a state attorney general from enforcing a statute alleged to violate the Fourteenth Amendment.²⁵ When a state officer comes into conflict with Constitutional guarantees, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."²⁶

Because of this metamorphosis, the offending state official is not treated as a representative of the state for Eleventh Amendment purposes when sued in his or her personal capacity. Any resulting judgment is against the official, not against the state.²⁷ Nevertheless, because he or she is acting *under color of law*, there is state action for purposes of the Fourteenth Amendment. In short, the state official's actions are "state action" for purposes of the Fourteenth Amendment but the state official is not the "state" for purposes of the Eleventh Amendment.

Thus, the Eleventh Amendment does not bar a suit against the state official in his or her *personal* capacity, even though the state official is really sued for actions taken under color of law with the badge of state authority.²⁸ Moreover, private plaintiffs may sue to enjoin state officials to comply with valid federal law in the future, even though these officials will be required to spend state funds to so comply.²⁹

However, if the plaintiff sues the state official in his or her *official* capacity, that really is another way of pleading an action against the state, and thus is within the Eleventh Amendment.³⁰ It is not necessary that the state be named as a party of record. For example, if a suit requests the courts to order the head of a state department of welfare to personally pay damages, that suit would be permissible; but if the suit seeks an order requiring him to pay past due amounts from the state treasury, that suit would be barred.³¹

The Eleventh Amendment thus places some loose limits on the power of the federal government to impose restrictions on the states. Congress cannot use its power under the Commerce Clause to remove a state's Eleventh Amendment

25. *Id.*; U.S. CONST. amend. XIV.

26. *Ex parte Young*, 200 U.S. at 159.

27. Because the judgment is not against the state treasury, the official is liable to pay from his or her own personal funds. However, even though the judgment is not against the state, the state may (if it wishes) reimburse the official. See 1 ROTUNDA & NOWAK, *supra* note 19, § 2.12, at 147-50. State officials sometimes purchase insurance to cover their liability under federal law. 3 *id.* § 19.23, at 605-06.

28. See *Hafer v. Melo*, 502 U.S. 21 (1991).

29. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 676 (1974) (allowing prospective relief to persons discriminated against by public official refusing to follow federally mandated guidelines).

30. See *Kentucky v. Graham*, 473 U.S. 159 (1985).

31. *Edelman*, 415 U.S. at 651.

immunity.³² The Commerce Clause, in short, cannot abrogate the Eleventh Amendment. This also makes sense, because it is reasonable to interpret the Eleventh Amendment as modifying the earlier enacted provisions of the Constitution and not the other way around.

However, another clause of the Constitution does not carry the minimal burdens that accompany federal exercise of power under the Commerce Clause or the Spending Clause.³³ This other clause—Section 5 of the Fourteenth Amendment—does operate to abrogate the protections of the Eleventh Amendment.³⁴ Section 5 authorizes Congress to impose requirements on the states even if those requirements are not generally applicable. Section 5 also does not require Congress to spend money to bribe the states. Additionally, Section 5 is not limited to activities within interstate commerce. Let us therefore turn to Section 5 of the Fourteenth Amendment.

II. SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment provides that “Congress shall have the power to enforce this article [of the Fourteenth Amendment] by appropriate legislation.”³⁵ Accordingly, Congress can enact legislation to protect individuals from state action that violates the Equal Protection Clause³⁶ or the Due Process Clause³⁷ of the Fourteenth Amendment.

In connection with this Section 5 power, Congress can create causes of action against the state and abrogate the protections of the Eleventh Amendment.³⁸ This unusual power is supported by history.³⁹ A major purpose of the Fourteenth Amendment was to give Congress the power to restrict state power, so the fact that the Fourteenth Amendment amends the earlier-enacted Eleventh Amendment is not surprising.

Congress considers powers exercised under Section 5 to be the preferable mode of regulating the states. First, unlike the exercise of power under the Commerce Clause, there is no requirement that the state activity affect interstate commerce.⁴⁰ Second, unlike the exercise of power under the Commerce Clause,

32. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), *overruling* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Idaho v. Coeur d’Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997).

33. U.S. CONST. art. I, § 8, cl. 1.

34. U.S. CONST. amend. XIV, § 5.

35. U.S. CONST. amend. XIV, § 5.

36. U.S. CONST. amend. XIV, § 1.

37. U.S. CONST. amend. XIV, § 1.

38. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

39. See John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

40. In modern times it seems that almost everything is in, or affecting, interstate commerce, but the Commerce Clause power still has a few important limits. See *United States v. Lopez*, 514 U.S. 549 (1995); see also Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of*

Congress can abrogate the limitations under the Eleventh Amendment. Third, because Congress is exercising power under Section 5 of the Fourteenth Amendment (which, in turn, refers to Section 1 of the Fourteenth Amendment,⁴¹ and Section 1 requires "state action"), there is no requirement that any regulation be "generally applicable." And finally, Section 5 imposes no adverse budgetary consequences, because there is no need for Congress to spend money under Section 5. In contrast, this spending is a requirement when Congress uses its Spending Clause⁴² power.

It is becoming more common for Congress to enunciate that it is using its special Fourteenth Amendment powers to regulate the states. For example, when Congress enacted the provisions of the Americans with Disabilities Act ("ADA") in 1990,⁴³ Congress used its powers under Section 5 of the Fourteenth Amendment,⁴⁴ and specifically abrogated any state protections under the Eleventh Amendment. The ADA specifically provides that—

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the Requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.⁴⁵

It now becomes crucial to determine whether laws like the ADA are within Congress' power to enforce the Fourteenth Amendment. If they are not, then the abrogation of the Eleventh Amendment immunity would be invalid. Congress could reenact these laws (like the ADA) that apply to the states by using its Commerce Clause power (assuming that Congress subjects the states to generally applicable laws),⁴⁶ but that power would not allow it to abrogate the Eleventh

Crime, and the Forgotten Role of the Domestic Violence Clause, 66 GEO. WASH. L. REV. 1 (1997); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 MICH. L. REV. 752 (1995).

41. Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. See also U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law . . .; nor shall any state deprive any person . . .").

42. U.S. CONST. art. I, § 8, cl. 1 ("to pay the Debts and provide for the common Defense and general Welfare of the United States").

43. 42 U.S.C. §§ 12101-12213 (1994).

44. See *Armstrong v. Wilson*, 942 F. Supp. 1252, 1261, 1262-63 (N.D. Cal. 1996) (finding both the ADA and Rehabilitation Act, 29 U.S.C. §§ 701-767b (1994 & Supp. II 1996), were enacted pursuant to Congress' authority under the Fourteenth Amendment).

45. 42 U.S.C. § 12202 (1994).

46. See *New York v. United States*, 505 U.S. 144 (1992).

Amendment.⁴⁷ Moreover, if Congress does not have Fourteenth Amendment power to apply laws like the ADA to the states, then those laws may not be justified by any Congressional power because Congress certainly did not use the Commerce Clause to justify abrogating the Eleventh Amendment. Congress, then, would have to reenact these laws under one of its other powers (the Spending Clause power or the Commerce Clause power, both of which are more limited powers), eliminate the purported abrogation of the Eleventh Amendment, and make sure that the states are governed by laws that are “generally applicable,” i.e., apply to private persons as well as the states.⁴⁸

If Congress has authority under Section 5 of the Fourteenth Amendment, then it has a broad power. The Supreme Court has generously interpreted Congressional power under Section 5, *if* Congress has used that power to remedy discrimination based on race and ethnic background—categories that the Court calls “suspect classes.”⁴⁹

Consider, first, *Katzenbach v. Morgan*.⁵⁰ In that case, the Supreme Court upheld the constitutionality of Section 4(e) of the Voting Rights Act of 1965.⁵¹ The Voting Rights Act imposed various electoral reforms on the states. Section 4(e), in particular, provided that no person who had completed the sixth grade in any accredited public or private American-flag school (i.e., a school within the jurisdiction of the United States, such as any Puerto Rican school) in which the predominant classroom language was not English could be denied the right to vote in any election because of his or her inability to read or write English.⁵² The

47. See *MacPherson v. University of Montevallo*, 938 F. Supp. 785, 788 (N.D. Ala. 1996) (finding that the Eleventh Amendment bars state employees from maintaining suit in federal court under the Age Discrimination in Employment Act, because that law was enacted pursuant to the Commerce Clause), *aff'd*, *Kimel v. State Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998).

48. Congress purported to use both its Fourteenth Amendment power and its Commerce Clause power in enacting the ADA. See 42 U.S.C. § 12101(b)(4) (1994). However, it is unfair to treat the entire law as being passed under both sections. First, the title that deals with private entities cannot be justified under Section 5 of the Fourteenth Amendment, because Section 5 requires that the federal law relate to state action (just as the Fourteenth Amendment requires state action). Second, the title that deals with states was not enacted pursuant to the Commerce Clause because Congress said specifically that it was abrogating the states' Eleventh Amendment immunity and Congress cannot do that under the Commerce Clause.

49. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (addressing voting rights and invidious discrimination against Puerto Ricans). Later in *Oregon v. Mitchell*, 400 U.S. 112, 295-96 (1970), Justice Stewart, in a separate opinion, explained that the invalidated New York statute “was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans,” and “conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services.”

This issue is discussed in detail in 3 ROTUNDA & NOWAK, *supra* note 19, §§ 19.2-19.5. See also *id.* at §§ 19.6-19.10 (Congressional enforcement of the Thirteenth Amendment) and §§ 19.11-19.12 (Congressional enforcement of the Fifteenth Amendment).

50. 384 U.S. 641 (1966).

51. 42 U.S.C. §§ 1971, 1973 to 1973gg-8 (1994).

52. *Id.* § 1973b(e).

statute consequently prohibited New York from enforcing its state laws requiring an ability to read and write English as a condition of voting.⁵³

The question in *Morgan* was whether the Congress could prohibit enforcement of the state law by legislating under Section 5 of the Fourteenth Amendment, even if the Court would find that the Equal Protection Clause⁵⁴ itself did *not* nullify New York's literacy requirement.⁵⁵ In fact, the Court had earlier ruled that the Equal Protection Clause does not, by its own force, prohibit literacy tests (unless they are administered in a racially discriminatory way).⁵⁶

The Court appeared to utilize a two-part analysis to uphold the federal statute. The Court first construed Section 5 as granting Congress "by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."⁵⁷ Under this interpretation, the Court held that it was within the power of Congress to determine that the Puerto Rican minority needed the vote to gain nondiscriminatory treatment in public services, and that this need warranted federal intrusion upon the states.⁵⁸

The Court reached the same result in what appears to be an additional part of its analysis. Because it "perceived a basis" upon which Congress might reasonably predicate its judgment that the New York literacy requirement was invidiously discriminatory, the Court said that it was also willing to uphold the federal legislation on that theory.⁵⁹ This second part of the analysis is quite significant. If the Court "perceived a basis" indicating that the federal law is not irrational, then the Court seemed to be saying that it would have to uphold the federal law.

If the Court in *Morgan* had limited its rationale to the first conclusion—that Congress may extend the vote to a class of persons injured by the racially discriminatory allocation of government services by a state—*Morgan* would offer no support for arguments that legislation could restrict the reach of the equal protection guarantee. A court still would retain authority to determine

53. See *Morgan*, 384 U.S. at 643-44.

54. U.S. CONST. amend. XIV, § 1.

55. *Morgan*, 384 U.S. at 649.

56. In *Lassiter v. Northampton County Bd. of Election*, 360 U.S. 45, 53-54 (1959), the Court refused to strike down state literacy requirements for voting as a violation of the Equal Protection Clause in the absence of any showing of discriminatory use of the test. The *Morgan* Court acknowledged *Lassiter* and refused to disturb its earlier ruling. *Morgan*, 384 U.S. at 649-50.

57. *Morgan*, 384 U.S. at 650.

58. *Id.* at 652-53. See generally *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), judgment reaff'd on reh'g 461 F.2d 1171 (5th Cir. 1972); Daniel W. Fessler & Charles M. Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. C.R.-C.L. L. REV. 441 (1971).

59. *Morgan*, 384 U.S. at 653. Congress, in the statute upheld in *Morgan*, explicitly relied on Section 5, but years later the Court made it clear that when Congress legislates under Section 5, it need not do so explicitly. The Court must determine Congress' intent, but Congress need not "recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'" *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983).

whether discrimination exists, and whether the legislative remedy is reasonably related to the proper goal.

On the other hand, by suggesting that Congress can legislate to address specific violations of the Equal Protection Clause, the *Morgan* Court may have conferred on Congress the power to *define* the reach of equal protection, to determine what “equal protection” means.⁶⁰ Justice Harlan specifically attacked this portion of the majority’s opinion as allowing Congress to demarcate or define constitutional rights “so as in effect to *dilute* [the] equal protection and due process decisions of this Court.”⁶¹ Justice Harlan’s fears bore fruit in the Religious Freedom Restoration Act of 1993 (“RFRA”)⁶² discussed below. Adding fuel to his concern was the fact that in later cases, various justices of the Supreme Court explicitly acknowledged and relied on *Morgan* as the reason to respect congressional accommodations of conflicting constitutional rights and powers.⁶³

In an influential discussion of congressional power under Section 5, Professor Archibald Cox analyzed *Morgan*, read it very broadly, and concluded that Congress does indeed have broad power to determine what constitutes a violation of equal protection.⁶⁴ Cox argued that Section 5 makes it irrelevant whether the relief for violations of the Fourteenth Amendment granted under a legislative enactment is greater or lesser than the courts would order. Cox

60. See *Morgan*, 384 U.S. at 653; Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 133. According to Burt, “[*Morgan* allows] a restrained Court, intent perhaps on undoing the work of its active predecessors, [to] permit a graceful and selective retreat limited to those areas where the political branch gives an explicit and contrary judgment.” *Id.*

61. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting) (emphasis added). See Donald F. Donovan, Note, *Toward Limits on Congressional Enforcement Power Under the Civil War Amendments*, 34 STAN. L. REV. 453 (1982).

62. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). The seminal article on this issue is, William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996), cited, *inter alia*, in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2168 (1997), which invalidated the RFRA.

63. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., with Blackmun & Powell, JJ., concurring) (finding white tenants had standing under Section 8(10)(a) of Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at scattered sections of 18 U.S.C., 25 U.S.C., 28 U.S.C. and 42 U.S.C.)), despite doubts of case or controversy under Article III of Constitution); *Welsh v. United States*, 398 U.S. 333, 371 (1970) (White, J., with Burger, C.J., & Stewart, J., dissenting) (making an argument for respecting congressional judgment accommodating the right to free exercise of religion within a statute for raising armies). See also *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (Burger, C.J., White & Powell, JJ., plurality opinion) (relying on Section 5 of the Fourteenth Amendment to justify a congressional decision to set aside 10% of federal work project funds for minority group members).

64. Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 199, 259 (1971) [hereinafter *The Role of Congress*]. See also Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

concluded that the *Morgan* rationale requires judicial deference to congressional judgments to limit rights as well as decisions to extend them.⁶⁵

Those justices and commentators who rely on *Morgan* to support the position that Congress has the power to define the reach of equal protection or due process base their analysis on three questionable predicates: (1) that congressional power to override state law under the Fourteenth Amendment is as broad as an expansive reading of *Morgan* would suggest; (2) that *Morgan* authorizes Congress to override not only state actions, but also federal court constructions of the Fourteenth Amendment that are too restrictive in the view of Congress; and (3) that Section 5 permits Congress to interpret the various guarantees of the Fourteenth Amendment more broadly or more narrowly than the federal courts.

Congress can rely on a broad reading of *Morgan* to authorize Congress to define or change rights using its Section 5 power only if each of these premises is correct. The major cases elaborating on the reach of *Morgan*—*Oregon v. Mitchell* and, now, the *City of Boerne* decision—reject these assumptions.⁶⁶ *City of Boerne*, in particular, has driven a stake through the heart of this broad reading of *Morgan*.

The facts of *Morgan* dealt with a federal statute that sought to protect racial minorities from state-sanctioned racial discrimination in voting. For many years the Court has deferred to Congress when it has enacted laws that protect suspect classes against state-sanctioned discrimination. Once passing beyond this category of race (a suspect class), the Supreme Court has been much less deferential to Congress than Professor Cox or other commentators would have wished. The first leading case in this area is *Oregon v. Mitchell*.⁶⁷

In *Mitchell* the Court considered challenges to various provisions of the Voting Rights Act Amendments of 1970.⁶⁸ Among other things, this law lowered the minimum voting age in state and local elections from twenty-one to eighteen years of age.⁶⁹ In purporting to enforce the Fourteenth Amendment, Congress found discrimination based on age, that a supposed “discrete and insular minority”⁷⁰ was created, and that it was necessary to remedy this denial of equal protection.⁷¹ Congress did not invent the phrase, “discrete and insular minority,”

65. *The Role of Congress*, *supra* note 64, at 259-60.

66. *Oregon v. Mitchell*, 400 U.S. 112 (1970), *superseded by* U.S. CONST. amend. XXVI; *City of Boerne v. Florida*, 117 S. Ct. 2157 (1977).

67. 400 U.S. 112 (1970).

68. Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. § 1973bb-1 (1994)).

69. *Id.* A majority of Justices, using different rationales, found that it was constitutional for Congress to abolish literacy tests (often used in a racist manner), to abolish state durational residency requirements in presidential elections (it affects the right to travel) and to enfranchise 18 year olds in federal (but not state) elections. *Mitchell*, 400 U.S. at 117-18.

70. *Mitchell*, 400 U.S. at 349 n.14 (Stewart, J. & Burger, C.J., Blackmun, J., concurring in part, dissenting in part) (those between 18 and 21 years of age).

71. *See id.* at 240 (Brennan, J., White & Marshall, JJ., dissenting) (noting that Congress

but lifted it from the famous footnote of *United States v. Caroline Products Co.*⁷²

If Congress has the power to create new rights, the exercise of that power can be habit-forming. For example, in the ADA, Congress made similar “findings,” in particular that

individuals with disabilities are a *discrete and insular minority* who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.⁷³

These findings are not difficult to make. Congress simply parrots whatever the case law provides that it should say. If the Court will treat these “findings” the way it often treats findings when reviewing Congressional power under the Commerce Clause, the Court will often defer to Congress because the Court upholds such factual findings if the conclusion is “rational.”⁷⁴

If Section 5 of the Fourteenth Amendment really gives Congress *carte blanche* power to enact legislation to remedy what Congress regards as a denial of equal protection, the Court in *Mitchell* should simply have upheld the statute. Instead, the fragmented Court invalidated it.⁷⁵ While there was no opinion of the Court, a clear majority of the Justices agreed that Congress cannot interpret the substantive meaning of the Equal Protection Clause.⁷⁶ The Justices were unwilling to give up the power of judicial review—the power to ultimately say what the law is—first established in *Marbury v. Madison*.⁷⁷

In *Mitchell*, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, concluded that Congress cannot usurp the role of the courts by determining the boundaries of equal protection.⁷⁸ Congress does not have “the power to determine what are and what are not ‘compelling state interests’ for equal protection purposes.”⁷⁹ Nor does Congress have the power to “determine as a matter of substantive constitutional law what situations fall within the ambit

justified giving 18 year olds the right to vote “in order to enforce the Equal Protection Clause of the Fourteenth Amendment.”).

72. 304 U.S. 144, 152 n.4 (1938) (Stone, J., for the Court).

73. 42 U.S.C. § 12101(a)(7) (1994) (emphasis added).

74. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Perez v. United States*, 402 U.S. 146 (1971).

75. *Mitchell*, 400 U.S. at 261-62.

76. *Id.* at 135.

77. 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

78. *Mitchell*, 400 U.S. at 346 (Stewart, J. & Berger, C.J., Blackmun, J., concurring in part and dissenting in part).

79. *Id.* at 350.

of the clause and what state interests are 'compelling.'"⁸⁰

Justice Harlan agreed that Congress could not define the reach of equal protection. Justice Harlan concluded that Congress' engagement in constitutional interpretation conflicts with the procedure for amending the Constitution.⁸¹ Justice Black similarly agreed that Section 5 could not justify a federal law that set the voting ages in state and local elections.⁸²

In short, Congress could not simply declare that people between eighteen and twenty-one years of age are a "discrete and insular minority" and were discriminated against in voting, and then use this declaration as the authority under Section 5 to force the states to allow these people to vote.⁸³ The Court has rejected the argument that discrimination based on age is discrimination that affects a suspect class.⁸⁴ Laws that discriminate on the basis of age are valid if they are rational.⁸⁵ Congress, therefore, cannot order the states to change their voting laws that make distinctions based on age because these voting requirements are rational.

Similarly, the courts have treated various forms of discrimination (disability, age discrimination) under the rational basis test and refused to create new categories of suspect classes under the Equal Protection Clause.⁸⁶ Therefore, one

80. *Id.* at 296 (Harlan, J., concurring in part, dissenting in part).

81. *Id.* at 205.

82. *Id.* at 117-35 (Black, J., announcing judgment of the Court). Justice Black wrote: In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on *account of race*. I seriously doubt that such a finding, if made, could be supported by substantial evidence. Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on *racial discrimination*, I would hold that Congress has exceeded its powers.

Id. at 130 (emphasis added).

See also *EEOC v. Wyoming*, 460 U.S. 226, 262 (1982) (Burger, C.J. & Powell, Rehnquist, O'Connor, JJ., dissenting) (concluding that allowing "Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government."). This case also involved age discrimination. The majority's resolution of the case did not require reaching the issue discussed by the dissent. See *EEOC*, 460 U.S. at 243.

83. For the same reason, Congress could not simply declare that fetuses are a "discrete and insular minority," and then claim that it could limit abortion rights.

84. See *EEOC*, 460 U.S. at 317-18.

85. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). Congress would have broader power to prohibit sex discrimination, because laws that discriminate on the basis of sex are judged by a stricter standard than the rational basis test. The Court uses what is called the "middle tier" analysis. See *Craig v. Boren*, 429 U.S. 190, 210 (1976); see also 3 *ROTUNDA & NOWAK*, *supra* note 19, §§ 18.20-18.24.

86. See *More v. Farrier*, 984 F.2d 269, 271 (8th Cir.), *cert. denied*, 510 U.S. 819 (1993) (finding that inmates limited to wheelchairs are not a suspect class); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (finding that a state's distinction between mentally retarded and mentally ill is "rational")

should expect that other federal laws that simply announce new “suspect classes” cannot be justified as a proper exercise of Congress’ power under Section 5 of the Fourteenth Amendment, just as Congressional efforts to grant eighteen-year-olds the right to vote in state and local elections was held unconstitutional in *Oregon v. Mitchell*.⁸⁷

Congress responded to *Mitchell* by proposing the Twenty-sixth Amendment, which the states then ratified. It guarantees that the votes of citizens eighteen years of age or older may not be abridged by the United States or any state on account of age.⁸⁸ The proper response to *Mitchell*, in short, was a constitutional amendment, which is the only way Congress can amend our Constitution.

Many lower courts have not even bothered considering the issue of Congress’ power to enact the ADA pursuant to its power under Section 5 of the Fourteenth Amendment and have often perfunctorily ruled that Congress does have the power to, in effect, create new suspect classes. In one case, the court conceded that handicapped status is not a suspect class, but then simply asserted that Congress can conclude the handicapped or other classes of people have been subjected to unequal treatment.⁸⁹ This, then, allows the exercise of broad Congressional powers under Section 5. However, the court never even mentioned, much less discussed, *Oregon v. Mitchell*.

In another decision, the U.S. Magistrate Judge similarly announced that Congress had the right to enact the ADA under the Fourteenth Amendment.⁹⁰ The judge also did not mention *Oregon v. Mitchell* and, in fact, relied on a law review article, the thesis of which the *Mitchell* Court had rejected.⁹¹ State court opinions have casually asserted—without mentioning or analyzing *Oregon v.*

and thus does not violate the Equal Protection Clause); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1420 (10th Cir. 1992) (finding that handicapped persons not a suspect class); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (finding that mental retardation is not a suspect or quasi-suspect class).

87. 400 U.S. 112 (1970).

88. U.S. CONST. amend. XXVI.

89. *Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1479 (D. Minn. 1996). This court readily concluded that the University of Minnesota is an instrumentality of the state for purposes of the Eleventh Amendment. *Id.* at 1476. *See also* *Williams v. Ohio Dept. of Mental Health*, 960 F. Supp. 1276 (S.D. Ohio 1997). *Cf. Lake v. Arnold*, 112 F.3d 682, 686 (3d Cir. 1997) (holding that retarded individuals constitute a class eligible to sue under 42 U.S.C. § 1985(3) (1994)). *But cf., Pierce v. King*, 918 F. Supp. 932, 940 (E.D.N.C. 1996) (appearing to reject the Fourteenth Amendment justification for the ADA), *aff’d*, 131 F.3d 136 (4th Cir. 1997).

90. *Niece v. Fitzner*, 941 F. Supp. 1497, 1503-04 (E.D. Mich. 1996) (holding that the ADA applies to state prisons, and Congress abrogated the states’ Eleventh Amendment immunity).

91. The article that the district court relied on was Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). Cox’s article argued for deference to Congress in creating new rights under the Equal Protection Clause. *Oregon v. Mitchell*, 400 U.S. 112, 127-28 (1970), rejected that premise. *See* Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839, 857-61 (1976).

Mitchell—that the ADA properly abrogates the state's Eleventh Amendment rights because the Fourteenth Amendment should be read broadly.⁹² Then came *City of Boerne v. Flores*.⁹³

III. CITY OF BOERNE V. FLORES

Perhaps the significance of *Oregon v. Mitchell* was unclear to many lower courts because the opinion was fragmented. That defect was cured when the Court expanded on what *Oregon v. Mitchell* had portended in *City of Boerne v. Flores*.⁹⁴ This time there was an opinion of the Court, and it ruled that Congress exceeded its powers under Section 5 of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act ("RFRA").⁹⁵ Congress enacted the RFRA to overturn *Employment Division, Department of Human Resources of Oregon v. Smith*.⁹⁶

In *Smith*, the Court had allowed the state to enforce generally applicable neutral laws (in that case, a law banning the use of peyote, an illegal drug) even if the law was applied to deny unemployment benefits to individuals who lost their job because of the illegal peyote use. In this case the users were members of a Native American Church who claimed that they used peyote as a sacrament.⁹⁷ Thus, they argued, the law interfered with their free exercise of religion.⁹⁸

Congress reacted to *Smith* by enacting the RFRA.⁹⁹ In contrast to *Smith*, the federal statute provided that both the States and the Federal Government cannot

92. Anonymous v. Connecticut Bar Examining Comm., No. CV94-0534160-S, 1995 WL 506660 at *6 (Super. Ct. Conn. Aug. 17, 1995). On other issues, this state court opinion was quite favorable to bar authorities and concluded that absolute judicial immunity protected bar examiners in an ADA suit from claims for damages, attorney's fees and punitive damages. *Id.* at *5. See Ronald D. Rotunda, *The Americans with Disabilities Act, Bar Examinations, and the Constitution: A Balancing Act*, 66 B. EXAMINER 6 (No. 3, August, 1997).

93. 117 S. Ct. 2157 (1997).

94. *Id.* Justice Stevens filed a concurring opinion. Justice Scalia filed an opinion concurring in part, in which Justice Stevens joined. Justice O'Connor filed a dissenting opinion, in which Justice Breyer joined in part. Justices Souter and Breyer each filed dissenting opinions. One of the few commentators to correctly predict the outcome in *City of Boerne* was Professor William Van Alstyne. See Van Alstyne, *supra* note 62, at 291.

95. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

96. 494 U.S. 872 (1990). See Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 633 (1998).

97. *Id.* at 903.

98. See *id.* at 873-90.

99. As President Clinton said when signing the RFRA, "[T]his act reverses the Supreme Court's decision in *Employment Division against Smith* . . ." 2 Pub. Papers 2000 (Nov. 16, 1993), quoted in Van Alstyne, *supra* note 62, at 291 & n.3.

“substantially burden”¹⁰⁰ a person’s exercise of religion, even under a rule of general applicability, unless the government demonstrates that the burden (1) furthers a “compelling governmental interest;” and, (2) is the “least restrictive means of furthering” that interest.¹⁰¹ The purpose of the RFRA was to overturn *Smith* where the U.S. Supreme Court interpreted the meaning and reach of the Free Exercise Clause.¹⁰²

*City of Boerne v. Flores*¹⁰³ also involved an application of the RFRA. Archbishop Flores applied for a permit to enlarge a church building to accommodate its congregation. The historical Landmark Commission denied the permit because the enlargement conflicted with an historical preservation plan. Archbishop Flores then sued under the RFRA.¹⁰⁴ When the case got to the Supreme Court, Justice Kennedy held that the RFRA was unconstitutional and not justified by Section 5 of the Fourteenth Amendment.¹⁰⁵

While Congress has Section 5 power to enforce the Free Exercise Clause, that power is only the power to “enforce,” not the power to create, or to redefine. It is a preventive power or a remedial power, not a power to delineate.¹⁰⁶ Relying on *Oregon v. Mitchell*, the Court said that this Section does not give Congress the right to decree the substance of what the First Amendment means: “Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”¹⁰⁷

The line between remedial legislation and legislation that makes a substantive change in the law may not always be clear. The Court will give Congress “wide latitude” in deciding where to draw the line, but there “must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁰⁸ The Court will make the final decision as to whether the federal remedy is proportional to the alleged wrong.

For example, the *City of Boerne* Court noted that when Congress enacted the Voting Rights Act of 1965—and the Supreme Court in *Morgan* later affirmed the constitutionality of various provisions¹⁰⁹—there was a long and widespread record before Congress and in the case law documenting state-sponsored racial discrimination in voting.¹¹⁰ The factual record before the *Morgan* Court reflected pervasive discriminatory and unconstitutional use of literacy tests.¹¹¹ But when one turns to the RFRA, one finds no evidence of any pattern of state laws being

100. 42 U.S.C. § 2000bb(a)(3) (1994).

101. *Id.* § 2000bb.

102. *See id.* § 2000bb(a)(4).

103. 117 S. Ct. 2157 (1997).

104. *Id.* at 2160.

105. *Id.* at 2168-72.

106. *See id.* at 2170-72.

107. *Id.* at 2164.

108. *Id.*

109. *Katzenbach v. Morgan*, 384 U.S. 641, 645 (1966).

110. *City of Boerne*, 117 S. Ct. at 2167.

111. *See id.* (citing *Morgan*, 384 U.S. at 656).

enacted because of religious bigotry in the last forty years. There is only evidence that some generally applicable laws placed incidental burdens on religion, but these laws were not enacted or enforced because of animus or hostility to religion, nor did they indicate that there was any widespread pattern of religious discrimination in this country.¹¹² Certainly some *individuals* engage in religious bigotry, but the states were not the guilty parties and the Fourteenth Amendment is limited to state action.

The *City of Boerne* Court emphasized that, given the paucity in the factual record, the power of Congress under Section 5 must be correspondingly limited:

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.¹¹³

The RFRA, in short, was a major federal intrusion "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."¹¹⁴ It is not an answer to say that Congress is merely trying to "over enforce" the guarantees of free exercise. If a highway patrolman arrests you for traveling fifty-five miles per hour in a sixty-five mile per hour zone, you would not be satisfied by the patrolman's response that he was merely "over enforcing" the traffic laws. You would object to being subjected to phantom restrictions. So also some states were upset with the phantom restrictions imposed by the RFRA.¹¹⁵

112. *See id.* at 2169.

113. *Id.* (citations omitted).

114. *Id.* at 2171. One of the interesting lower court cases applying the RFRA to invalidate a state policy was *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995). The Ninth Circuit ruled that the RFRA required a state elementary school to make exceptions to its "no weapons" policy, so that all Sikh children (seven years old and older) could carry knives to school. *Id.* at 885-86. This knife (or "kirpan") has a three and a half-inch blade. The knives were, however, made immovable by being tightly sewn to the sheaths. *Id.* at 886.

115. The RFRA applies both to federal laws and to state laws that indirectly burden the free exercise of religion. To the extent that the RFRA applies to federal laws, there is no issue under Section 5 of the Fourteenth Amendment. Congress is simply telling federal courts, in interpreting federal law, to read the law in a way described in the RFRA to protect free exercise rights. However, the RFRA would still raise a question of whether this free exercise exemption from the normal requirements of neutrally applicable federal law violates the Establishment Clause. That issue was not before the Court in *City of Boerne* and is not the subject of this paper. *See Van Alstyne, supra* note 62, at 294 & n.12.

IV. AFFIRMATIVE ACTION AFTER *CITY OF BOERNE*

*Oregon v. Mitchell*¹¹⁶ and *City of Boerne*¹¹⁷ should both cast a strong shadow over some types of what is often called affirmative action or reverse discrimination. In fact, *City of Boerne* stated explicitly that “[a]ny suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.”¹¹⁸

Nonetheless, some Justices have sought to rely on Section 5 of the Fourteenth Amendment to justify federal statutes that distribute benefits or burdens on the basis of race if the state acts for benign purposes. After a series of cases, it now appears that a majority of the Justices reject the notion that Congress can use Section 5 to justify action that would violate Section 1 of the Fourteenth Amendment if a state had engaged in the action. While the Court has come to that conclusion in several cases,¹¹⁹ some commentators have been more reluctant to embrace that result.¹²⁰

The framers of Section 5 of the Fourteenth Amendment apparently intended that provision to increase federal power at the expense of the states. However, neither the language nor the reasoning behind Section 5 supports the view that it increased federal *congressional* power over federal *judicial* power. A brief analysis of Justice Douglas’s almost-forgotten comments in *Katzenbach v. Morgan*¹²¹ should make that clear.

Although Justice Douglas joined the opinion of the *Morgan* Court, he reserved judgment on whether the federal law¹²² in question was constitutional in all respects. Justice Douglas would reserve “judgment until such time as [the issue] is presented by a member of the class against which that particular

116. 400 U.S. 112 (1970).

117. *City of Boerne*, 117 S. Ct. at 2157.

118. *Id.* at 2167 (citing *Mitchell*, 400 U.S. at 112).

119. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (“Congress may not authorize the States to violate the Equal Protection Clause.”). The states argued that a federal statute allowed durational residency requirements in state welfare programs. The Court rejected that argument. See also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 7332-33 (1982) (“Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.”); *California v. Goldfarb*, 430 U.S. 199, 210 (1977) (finding in part that overbroad generalizations of gender-based needs violated rights guaranteed by the Fourteenth Amendment); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (holding “that no State can pass a law regulating elections that violates the Fourteenth Amendment’s” Equal Protection Clause).

120. See, e.g., Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 591-92 (1996) (arguing that Congress may grant more protection for constitutional liberties than the Court interprets).

121. 384 U.S. 641, 658 (1966) (Douglas, J., concurring with exceptions).

122. The federal law eliminated English literacy tests as a requirement for voting, as applied to anyone who successfully completed the sixth grade in a school accredited by Puerto Rico or other jurisdiction that was under the American flag. See *id.* at 643-44.

discrimination is directed.”¹²³ Should a person literate in English or in a language other than English (e.g., French) but not Spanish as taught in a Puerto Rican school (or Spanish, as taught in Mexico, or Spain) be able to challenge the law on equal protection or other constitutional grounds? No one but Justice Douglas thought that the answer to this question was difficult.

The majority of the *Morgan* Court did not bother discussing Douglas’ opinion, but the Justices might have reasoned as follows: If New York decided to drop its literacy requirement entirely, no court would look with favor on a challenge by an English-literate voter claiming that his vote was somehow “diluted.” States need not impose a literacy requirement as a prerequisite to voting. It would also be rational for New York to eliminate part of its English-language requirement in part, by relying on the educational system of other American-flag schools (*i.e.*, schools located within the jurisdiction of the United States). Because a state could constitutionally decide to eliminate its literacy requirement entirely (or to eliminate it as to people educated in an American-flag school), Congress, in turn, could similarly eliminate the literacy requirement.

In other words, if a state could eliminate its literacy requirement directly, Congress could also eliminate the literacy requirement by virtue of Section 5. If there were no equal protection or other constitutional restriction that would prevent a state from eliminating or modifying its English literacy requirement, then (if Congress has a source of federal power to regulate this area) Congress could equally eliminate or modify the English literacy requirement without worrying about violating due process or another constitutional restriction. On the other hand, if it would violate the Equal Protection Clause for a state to enact a particular law, Congress cannot reverse that result simply by enacting a federal law that says that the state law is all right.

In *Morgan*, a state voter could not successfully complain about vote dilution, because such a state voter would have no successful claim if the state itself had decided to eliminate or limit its literacy requirement.¹²⁴ The state also cannot complain that Section 5 expanded federal legislative power at the expense of the states, because that was the purpose of Section 5. However, that is all Section 5 did. It neither gave Congress the right to define the meaning of equal protection nor did it otherwise expand legislative power at the expense of the judiciary. Congress does not have the power to enforce Section 5 *as Congress interprets* Section 1 of the Fourteenth Amendment, because the Supreme Court, after *Marbury v. Madison*,¹²⁵ is the ultimate arbiter of what the Constitution means. The Court, not Congress, interprets Section 1. But Section 5 gives Congress the power to enforce Section 1 *as the Court interprets* that section.

The Voting Rights Act of 1965 at issue in *Morgan* was an attempt by Congress to expand the power of the federal government over the states and to extend protection to a group whose rights had often been denied in violation of the Fourteenth Amendment. Therefore, the statute in *Morgan* was upheld on the

123. *Id.* at 658-59.

124. *Id.* at 656-57.

125. 5 U.S. (1 Cranch) 137 (1803).

rational relationship test.¹²⁶ The federal law did not pass out benefits or burdens on the basis of race. It simply eliminated the English literacy test for people who completed the sixth grade in an American-flag school.

If Congress were to limit federal *courts'* power to determine if a law discriminated on the basis of race, that is quite a different matter, and it would not involve the facts of *Morgan*. The federal law in *Morgan* simply removed a literacy test for people educated in an American-flag school. If a state had enacted a similar state law, it would not have involved passing out any benefits or burdens on the basis of race. But if the state law—or the federal law enacted pursuant to Section 5 of the Fourteenth Amendment—passed out benefits or burdens on the basis of color, a court should strictly scrutinize such a legislative scheme and uphold it only if supported by a compelling state interest.¹²⁷ The decision in *Morgan*, upholding the requirement of a more liberal voting eligibility standard than the judicially defined constitutional requirement, does not support the argument that Congress may restrict a court's power to interpret the requirements of the Fourteenth Amendment, or that Congress may define what "equal protection" or "due process" is, or that Congress may limit the available remedies for violations of those rights.¹²⁸

126. *Morgan*, 384 U.S. at 653-56.

127. *Cf. Hunter v. Erickson*, 393 U.S. 385 (1969). In *Hunter*, the Court held that a provision in a city charter prohibiting the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the city's voters was unconstitutional. *Id.* at 391. The Court found that although the statute did not discriminate on its face, its effect was to place a burden on the minority. *Id.* The Court asserted that a state may not make it more difficult to enact legislation for one group than for another. *Id.* at 392-93. *See also* *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967); Charles Black, *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection and California's Proposition 13*, 81 HARV. L. REV. 69, 82 (1967). A congressional attempt to make it more difficult for the members of one group to enforce their constitutional rights to, for example, integrated public education, should be subject to this same equal protection strict scrutiny.

128. *See* *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (rejecting argument that congressional approval of one-year residence requirement for welfare recipients authorizes states to impose such requirements). *Accord*, *Graham v. Richardson*, 403 U.S. 365, 382 (1971). *But cf.* *Welsh v. United States*, 398 U.S. 333, 368 (1970) (White, J., with Burger, C.J. & Stewart, J., dissenting) (making an argument for respecting congressional judgment accommodating the right to free exercise of religion within a statute for raising an army).

Neither may Congress use its power to limit standing so as to affect substantive constitutional rights if it could not do so directly. The courts have often asserted that if a dispute is otherwise justiciable, the question whether a litigant is a proper party to request adjudication of an issue is within the power of Congress to determine. *See, e.g.,* *Sierra Club v. Morton*, 405 U.S. 727, 732 & n.3 (1972) (stating that in justiciable suits, Congress has the power to determine whether a party has standing to sue). Yet, where a restriction on standing may affect a constitutional right, such statements should not control. Rather, they should be limited to cases where Congress has created and expanded standing by statute.

The Court has indicated that Article III also limits the power to restrict or grant standing. *See*

In footnote ten, the *Morgan* Court issued a caveat that underscored the distinction between the power to enforce versus the power to define the reach of equal protection:

Section 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by section 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.¹²⁹

However, while the Court understood the problem, merely making this statement does not make the problem go away. Simply stating that Congress can move in only one direction, like a ratchet, does not advance the analysis, because expanding one right may dilute another. If Congress enacts a law that expands freedom of choice in attending a public school, it may dilute efforts to achieve racially nondiscriminatory schools. If Congress expands the meaning of "life" or "person" in the Due Process Clause, it may restrict the abortion rights that the Court has created in its case law. In some cases, if the state expands one person's free exercise rights by granting a special exemption, it may violate the Establishment Clause.¹³⁰

Although the Court in *Morgan* may not have carefully articulated why the power to enforce does not include the power to dilute, it did recognize what *City of Boerne* later confirmed: that a Section 5 power to dilute would conflict with a primary purpose of the Equal Protection Clause, to protect citizens' rights under the Fourteenth Amendment against a hostile legislature.¹³¹ The command of the guarantees of Section 1 should control the Section 5 power: neither the states nor the Congress should have the power to violate the Equal Protection Clause or the Due Process Clause, as defined by the courts, if the guarantee is to be meaningful.¹³² The Congressional power to enforce the Fourteenth

Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) ("Apart from Article III jurisdictional questions, . . . Congress can, of course, resolve the question [of standing] one way or another, save as the requirements of Article III dictate otherwise.")

Presumably, due process creates another limitation. See *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 301 (1943).

129. *Morgan*, 384 U.S. at 651-52 n.10 (citations omitted). See also *Oregon v. Mitchell*, 400 U.S. 112, 128-29 (1970) (Black, J.), discussed below.

130. U.S. CONST. amend. I.

131. *Morgan*, 384 U.S. at 651-52 n.10. See also *City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997).

132. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), *opinion supplemented*, 349 U.S. 294 (1955).

Amendment is not the power to override the judicial interpretation of the clauses of that Amendment.¹³³

As a logical matter, Section 5 of the Fourteenth Amendment should not be read to grant or to fortify any special congressional power to do something that the states could not constitutionally already do. Recall that in *Morgan* Congress used Section 5 to eliminate state obstacles, such as literacy tests, to exercising the franchise without regard to race.¹³⁴ The New York legislature itself could have enacted these reforms without raising any constitutional questions. Section 5 only allowed Congress to do that which New York could have already done: Section 5 simply allowed Congress to enact these reforms, without New York being able to raise successfully either a Tenth Amendment defense or any other federalism argument to invalidate what Congress did. Section 5 of the Fourteenth Amendment modifies the Tenth Amendment; it does not modify Section 1 of the Fourteenth Amendment or any other constitutional clause. Thus, if an affirmative action plan violates the Constitution, Section 5 of the Fourteenth Amendment should not give Congress any special power to engage in validating such a violation. Otherwise, the caveat in footnote ten to the *Morgan* opinion is wrong.¹³⁵

While a court should not accept a subterfuge, it is not enough for the Court to announce, like an *ipse dixit*, that Section 5 does not authorize Congress to dilute constitutional rights, because legislation can be redrafted so that dilution of some rights is accompanied by expansion of other rights. While the *Morgan* Court was correct that Section 5 could not have been intended to authorize Congress to limit Fourteenth Amendment rights, the Court's opinion would not have suffered if it had offered more explanation. *City of Boerne* corrected this oversight when it held that Congress cannot define or alter the meaning of the Fourteenth Amendment by mere legislation.¹³⁶ The Constitution is not like ordinary legislation; it is the fundamental law, and shifting legislative majorities should not be able to change the judiciary's interpretation of that fundamental law.¹³⁷

133. In *Mississippi University for Women v. Hogan*, the Court quoted footnote 10 of *Katzenbach v. Morgan* and added: "Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." 458 U.S. 718, 732-33 (1982) (quoting *Morgan*, 384 U.S. at 651-52 n.10). The *Hogan* Court held that the state, under the Fourteenth Amendment, could not have a female-only nursing school; no congressional statute could excuse the state from such gender discrimination. *Id.* at 731.

See also *Califano v. Goldfarb*, 430 U.S. 199, 210 (1977). Cf. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (stating that the powers granted by the Constitution to Congress or the states "are always subject to the limitation that they may not be exercised in a way that violated other specific provisions of the Constitution").

134. See *Morgan*, 384 U.S. at 645.

135. See *id.* at 651-52 n.10.

136. *City of Boerne*, 117 S. Ct. at 2168.

137. See *id.* (citing Van Alstyne, *supra* note 62, at 292-303 (1996)).

A. Affirmative Action and Federal Set-Asides

Let us apply this analysis to the Court's recent affirmative action cases. First, there is *Adarand Constructors, Inc. v. Peña*,¹³⁸ a case where federal law mandated that a certain percentage of federal contracts must be "set aside" to be awarded on the basis of race. The Court held that such federal affirmative action programs, like state programs, must comply with strict scrutiny.¹³⁹ That is, they must be narrowly tailored to further compelling government interests. The majority ruled that, to the extent that an earlier case had held federal racial classifications to a less rigorous standard, it is no longer controlling.¹⁴⁰

Adarand Constructors appears to teach us that, if certain state affirmative action programs violate the Equal Protection Clause, then a similar federal affirmative action program will also violate the Constitution, because the Federal Government cannot use its powers under Section 5 of the Fourteenth Amendment to ratify a state violation of equal protection or to engage in action that would violate Section 1 of the Fourteenth Amendment if a state were the actor.¹⁴¹ The Court explicitly did not decide the reach of Section 5 of the Fourteenth Amendment in *Adarand Constructors*,¹⁴² but its later decisions, discussed below, that address racial gerrymandering do discuss the reach of Section 5 and the Court makes clear that Section 5 does not grant Congress the power to authorize states to violate Section 1 or to excuse states from complying with Section 1.

B. Affirmative Action and Racial Gerrymandering

In the racial gerrymandering cases, like the set-aside cases, the Court has

138. 515 U.S. 200 (1995) (5-4 decision). The *Adarand Constructors* Court also overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which did not apply strict scrutiny to a federal affirmative action program. The new test requires "strict scrutiny." Cf. Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and The Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995) (concluding that RFRA is unconstitutional and violates the First Amendment); Lino A. Graglia, Podberesky, Hopwood, and *Adarand: Implications for the Future of Race-Based Programs*, 16 N. ILL. U. L. REV. 287 (1996) (concluding that such race-based programs are unconstitutional).

139. *Adarand Constructors, Inc.*, 515 U.S. at 204.

140. *Id.*, overruling in part *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

141. The Fourteenth Amendment, by its own terms, only applies to states, not the Federal Government. But, in general, if an action violates the Equal Protection Clause, then it violates the equal protection component of the Due Process Clause of the Fifth Amendment, and the Fifth Amendment does apply to the Federal Government. See *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

142. *Adarand Constructors*, 515 U.S. at 230 (citations omitted):

It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. We need not, and do not, address these differences today.

backtracked from its earlier decisions and has now invalidated redistricting plans where the state has drawn district lines simply to favor a racial group. The Court is quite concerned that such racial gerrymandering will lead to more discrimination. The Court's rationale in these cases suggests that if the *state* unconstitutionally gerrymandered the voting district for racial reasons, the Court will not allow the *federal government* to engage in similar racial gerrymandering. If it is unconstitutional for a state to engage in such activities, then Congress should have no Section 5 power under the Fourteenth Amendment (or any similar power under Section 2 of the Fifteenth Amendment)¹⁴³ to change the result of this constitutional decision.

Consider the case of *Shaw v. Reno*.¹⁴⁴ White plaintiffs attacked racial gerrymandering designed to place more black voters in a district in the hope that the voters would more likely elect black candidates. The Court ruled that North Carolina's efforts to comply with the Voting Rights Act did not immunize the redistricting from constitutional attack.¹⁴⁵ If the redistricting was only as an

143. U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

144. 509 U.S. 630 (1993) (5-4 decision), *on remand*, 861 F. Supp. 408 (E.D.N.C. 1994). The Court remanded for further proceedings. Justice White, joined by Justices Blackmun and Stevens, dissented. Justices Blackmun, Stevens, and Souter each filed dissenting opinions. North Carolina citizens challenged the constitutionality of North Carolina's congressional redistricting on the grounds that the state had engaged in unconstitutional racist gerrymandering by deliberate segregation of voters into separate districts on the basis of race. The plaintiffs did not allege that they were white, but the three judge district court took judicial notice that appellants were white. *Shaw*, 509 U.S. at 642. Plaintiffs complained that "the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process." *Id.* at 641.

Justice O'Connor, writing for the Court, invalidated this state legislation (which had been enacted because of objections from the U.S. Attorney General) that was specifically designed to create majority black districts in North Carolina. *Id.* at 658. Plaintiffs complained that two Congressional districts, where a majority of black voters were concentrated arbitrarily, were created for racial purposes, without regard to any other considerations, such as compactness, contiguousness, geographic boundaries, or political subdivisions, in order to "assure the election of two black representatives in Congress." *Id.* at 630. One of the two majority-black districts looked like a "bug splattered on a windshield." *Id.* at 635 (citing WALL ST. J., Feb. 4, 1992, at A14). The other was approximately 160 miles long, and, for much of its length, no wider than a highway. If you drove down the street with both car doors open, "you'd kill most of the people in the district." *Id.* at 636 (citing WASH. POST, Apr. 20, 1993, at A4).

145. *Id.* at 655-57. The plaintiffs in *Shaw* alleged that the state legislature had created two congressional districts where a majority of black voters were concentrated "arbitrarily" for racial reasons. The Court held that plaintiffs stated a cause of action under the Equal Protection Clause when they claimed that the redistricting legislation "is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for the purposes of voting, *without regard for traditional districting principles and without sufficient compelling justification.*" *Id.* at 642 (emphasis added). The Court majority rejected a notion that there is "benign" racial

effort to segregate the races for purposes of voting without regard for traditional districting principles, the Court ruled that there is a cause of action under the Equal Protection Clause.¹⁴⁶

*Miller v. Johnson*¹⁴⁷ extended *Shaw* and invalidated a Georgia congressional

gerrymandering. *Id.* at 653.

In the middle of the 1990s, a result of racial gerrymandering was that the Republican Party in the South was helped because black voters (who tend to vote Democratic) were put into districts that became overwhelmingly Democratic. Dozens of Republican Congressmen found themselves in safer districts or were placed in districts that were formerly safe Democratic districts but now were districts where the Republicans could mount serious challenges. Michael K. Frisby, *Florida Race Shows How Democrats Were Hurt By Efforts to Create Black-Dominated Districts*, WALL ST. J., Oct. 25, 1994, at A20 (Midwest ed.).

146. *Shaw*, 509 U.S. at 654. The Court emphasized that North Carolina's efforts to comply with the Voting Rights Act did not immunize the redistricting from constitutional attack: "The Voting Rights Act and our case law make clear that a reapportionment plan that satisfied § 5 [of the Voting Rights Act] still may be enjoined as unconstitutional." *Id.* Thus, the Court concluded that the Voting Rights Act does *not* "give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression." *Id.* "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Id.* "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* at 656-57.

Compactness, contiguity, and respect for political boundaries are not constitutionally required, but if they exist, they "are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial grounds." *Id.* at 646. On the other hand, if people are widely separated by geographic and political boundaries but placed together because of the color of their skin, there is "an uncomfortable resemblance to political apartheid." *Id.* at 647. Therefore, if plaintiffs allege that legislation, which is race-neutral on its face, cannot rationally be understood as anything other than an effort to separate voters into different districts on the basis of race, and also, that the separation lacks "sufficient justification," then plaintiffs have stated a cause of action under the Equal Protection Clause. *Id.* at 649. See also James Blumstein, *Racial Gerrymandering and Vote Dilution: Shaw v. Reno in Doctrinal Context*, 26 RUTGERS L.J. 517 (1995).

147. 515 U.S. 900 (1995). On remand, the district court adopted a redistricting plan with only one black-majority district, and the U.S. Supreme Court affirmed the district court on appeal. *Abrams v. Johnson*, 117 S. Ct. 1925 (1997), *aff'g* *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995). The Court ruled, five to four, that the district court was not required to defer to unconstitutional plans previously adopted by the Georgia legislature and that the lower court acted within its discretion in concluding that it could not draw two black-majority districts without engaging in racial gerrymandering. *Id.* at 1928. The district court plan also did not result in dilution of black voting strength or retrogression in the position of racial minorities in violation of the Voting Rights Act and did not violate the Constitutional requirement of one person, one vote. *Id.* at 1927-28.

Compare *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194-95 (1997), which upheld a state redistricting plan by ruling that the district court's finding that the settlement agreement did

redistricting plan that involved racial gerrymandering that favored racial minorities. In *Miller*, the proof showed that race was the “predominate factor” in drawing the lines for the Eleventh District. The shape of the district was particularly bizarre on its face, and there was considerable evidence that the district was “unexplainable other than by race.”¹⁴⁸ Under the equal protection claim, the Court held that Georgia’s new Eleventh District was invalid under the principles announced in *Shaw*, and, that the District could not be sustained as narrowly tailored to serve a compelling governmental interest.¹⁴⁹

The state argued that it had a compelling reason to draw the district the way that it was drawn, and that reason was the need to comply with preclearance mandates issued by the Department of Justice, but the Court rejected that justification as not “compelling.” The Court argued that Georgia’s earlier enacted plans did not violate Section 5 of the Voting Rights Act and hence Georgia’s redrawing of the Eleventh District was not necessary.¹⁵⁰

The following term, in *Shaw v. Hunt*,¹⁵¹ the Court further elaborated on the principle of *Miller*. First, the Court agreed with the unanimous lower court finding that the “serpentine” districting was deliberately drawn to produce one or more districts of a certain racial composition.¹⁵² Then the Court turned to the second major issue: the trial court had also held that the redistricting plan was narrowly tailored to further the State’s compelling interests in complying with Sections 2 and 5 of the Voting Rights Act. On this issue, the Court reversed and held that the “bizarre-looking” majority-black district violated the Equal Protection Clause.¹⁵³ First, the Court found that the asserted state interest in eliminating the effects of past discrimination was not a compelling interest because that claimed interest did not actually precipitate the use of race in this redistricting plan.¹⁵⁴ Second, the Court ruled that creating an additional majority-black district was not required under a correct reading of Section 5.¹⁵⁵

not subordinate traditional districting principles to race in violation of *Miller v. Johnson*, 515 U.S. 900 (1995), was not clearly erroneous.

148. *Miller*, 515 U.S. at 917.

149. *Id.* at 919-20.

150. *Id.* at 923.

151. 517 U.S. 899 (1996). Justice Stevens filed a dissenting opinion joined in part by Justices Ginsburg and Breyer. Justice Souter filed a dissenting opinion also joined in part by Justices Ginsburg and Breyer. See also *Bush v. Vera*, 517 U.S. 952 (1996). In *Bush*, a Texas redistricting plan created two black-majority districts and one Hispanic-majority district. The Department of Justice precleared the redistricting as compliant with the Voting Rights Act. Voters challenged the redistricting as racially gerrymandered in violation of the Fourteenth Amendment, a three-judge district court agreed, and the Supreme Court, with no majority opinion, affirmed. *Id.* at 986.

152. *Shaw*, 517 U.S. at 905-06.

153. *Id.* at 915.

154. *Id.* at 912.

155. *Id.* at 911. However, the Court did not reach the question whether compliance with the Voting Rights Act, Section 5, was, on its own, a compelling state interest.

Third, the Court concluded that racial gerrymandering was not a narrowly tailored remedy to comply with Section 2 of the Act because the minority group was not geographically compact.¹⁵⁶

CONCLUSION

Acts of Congress that purport to expand human rights, the right to vote, the right to practice one's religion, and so forth, may be enacted for the best of intentions. Obviously both state and private entities should not discriminate against otherwise qualified individuals. Nonetheless, a broad reading of congressional power to, in effect, reverse Supreme Court decisions interpreting the meaning of the Constitution, is bad constitutional law and bad policy. To read Section 5 of the Fourteenth Amendment to grant Congress the power to interpret the meaning of the Constitution is to read that Clause incorrectly.

Nonetheless, many courts below the U.S. Supreme Court have not considered with any care the limits to Congress' Section 5 power. *Oregon v. Mitchell*¹⁵⁷ and *City of Boerne v. Flores*¹⁵⁸ are proof that those limits exist, but after looking at many of the lower court cases, one would often never know that the Supreme Court ever decided either case. Many lower court cases upholding federal power under Section 5 of the Fourteenth Amendment never cite *Mitchell*—a lapse that should be surprising, because *Mitchell* led to the ratification of the Twenty-sixth Amendment. There are only twenty-seven amendments to our Constitution, and the Twenty-sixth Amendment is one of only a handful that actually reverse a Supreme Court decision. *Oregon v. Mitchell* is not an unknown decision lost in the sands of time, but many lower courts act as if it were so.¹⁵⁹

156. *Id.* at 915.

157. 400 U.S. 112 (1970).

158. 117 S. Ct. 2167 (1997).

159. After *City of Boerne* the direction of the tide of cases is unclear. At least there is now case law recognizing the significance of Supreme Court decisions limiting congressional power under Section 5. Compare *Kimel v. State Bd. of Regents*, 139 F.3d 1426, 1448 (11th Cir. 1998) (Cox, J., dissenting in part) (stating that "[b]ecause the ADEA is not a valid exercise of Congress' § 5 authority, Congress could not have abrogated the states' Eleventh Amendment immunity to suit."). See also *Condon v. Reno*, 972 F. Supp. 977, 979 (D.S.C. 1997) (holding that the Driver's Privacy Protection Act was unconstitutional under the Tenth Amendment). The court noted that Congress had not invoked its spending power to justify the law. *Id.* at 982. Contrast *Coolbaugh v. Louisiana*, 136 F.3d 430, 432 (5th Cir. 1998) (Davis, J., joined by Duhe, J.) (holding that the ADA is within Congress' power under Section 5 of the Fourteenth Amendment, despite the *City of Boerne* case). Judge Smith dissented. *Id.* at 439. See also *Clark v. California*, 123 F.3d 1267, 1271-72 (9th Cir. 1997) (holding that the ADA and the Rehabilitation Act of 1973 are justified by Section 5 of the Fourteenth Amendment and both abrogate Eleventh Amendment immunity).

Also compare Kris W. Kobach, *Contingency Fees May Be Hazardous to Your Health: A Constitutional Analysis of Congressional Interference with Tobacco Litigation Contracts*, 49 S.C. L. REV. 215 (1998) (raising Tenth Amendment objections to Federal interference with state contracts), with Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Federalism*, 1997 SUP. CT. REV. 199, 248 (criticizing *Printz v. United States*, 117 S. Ct. 2365 (1997), for "its lack of

Some people are concerned that this interpretation of Section 5 of the Fourteenth Amendment means that Congress cannot expand human rights, civil rights, and political rights by using a broad power under Section 5.¹⁶⁰ The concept of “expanding” human rights, like motherhood, apple pie, and the flag, sounds great. But this power is like a knife that cuts both ways. Such a broad congressional power can be used to expand some rights by narrowing others.

Creative legislation should be able to recast a simple dilution of one right as an expansion of another right. A Congress bent on limiting desegregation, for example, would not simply enact a law authorizing states to establish racially segregated schools. Instead, the law might provide that—in an effort to expand freedom of choice—states should establish a variety of schools and allow people to transfer to their preferred schools, even if the result of such transfers meant that some schools became disproportionately white or black.

Although the Court in *Katzenbach v. Morgan*¹⁶¹ found broad congressional power under Section 5 to determine that state practice interferes with Fourteenth Amendment rights, it also examined the federal statute for consistency with constitutional requirements.¹⁶² The Court’s analysis confirms that federal courts will scrutinize congressional action under Section 5 to assure that it meets the equal protection requirements embodied in the Fifth Amendment.¹⁶³ If the legislation includes a suspect classification or affects a fundamental right, then under traditional equal protection analysis only a compelling state interest will support its constitutionality.

constitutional grounding”).

160. See, e.g., Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CINN. L. REV. 199 (1971); John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209 (1997).

161. 384 U.S. 641 (1966).

162. *Id.*

163. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (racial discrimination so unjustifiable as to also be a denial of due process; racial segregation in District of Columbia schools such a denial under Fifth Amendment).

A COMMENT ON CONGRESSIONAL ENFORCEMENT

SAIKRISHNA PRAKASH*

For all its brevity and simplicity, Section 5 of the Fourteenth Amendment has been one tough nut to crack. It provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article,” i.e., the Fourteenth Amendment.¹ Some have insisted that Section 5 cedes to Congress wide latitude “in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”² Others deny such pretensions for the seemingly modest Section.³

My own views largely track Professor Rotunda’s.⁴ Notwithstanding Section 5, Congress lacks the textual authority to constrain state law and action above and beyond the constraints already imposed by the Fourteenth Amendment and the rest of the Constitution. Because Congress lacks a textual hook, the Constitution’s implicit background rule made explicit in the Tenth Amendment⁵ precludes federal legislation.

Rather than merely reiterating Professor Rotunda’s excellent points, this Comment addresses two Section 5 questions. First, does Section 5 require the judiciary⁶ to yield or to defer⁷ to congressional conclusions of law and fact regarding possible violations of the rest of the Fourteenth Amendment?⁸ Second, more generally, what authority does Section 5 actually cede to Congress?⁹ Because more than half a dozen amendments cede to Congress the authority to

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1. U.S. CONST. amend. XIV, § 5.

2. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (concluding that under Section 2 of the Thirteenth Amendment Congress may “rationally . . . determine what are the badges and incidents of slavery, and [has] the authority to translate that determination into effective legislation”).

3. *See, e.g., Morgan*, 384 U.S. at 666 (Harlan, J., dissenting) (admitting that Congress can legislate remedies but denying that Congress may draw conclusive judgments about whether a violation has occurred).

4. *See* Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163 (1998).

5. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

6. “Judiciary” refers to the federal and state judiciaries.

7. Judicial “deference” consists of a practice where the judiciary, to some degree, accepts legislative determinations even though the judiciary might have reached a different conclusion in the first instance.

8. This Comment addresses whether Section 5 *requires* the judiciary to defer to Congress. It does not consider whether the judiciary may choose to defer to congressional legal and factual findings.

9. Answering the second question first would obviate the need to consider the first question separately. Nevertheless, it will prove helpful to analyze the issue of deference on its own.

“enforce” their substantive provisions with “appropriate legislation,”¹⁰ the proper answers to these questions are of undoubted interest. Although these “enforcement” provisions were ratified over the course of more than 100 years, we might suppose that the same meaning ought to be supplied to all such provisions because they employ almost identical language.

The answer to the first question is no. The judiciary need not bestow *any* deference upon legislative conclusions of law or fact embedded in legislation passed pursuant to Section 5.¹¹ At the risk of shedding more heat than light, we might say that nothing in Section 5 (or the other enforcement provisions) intimates, let alone demands, that enforcement statutes enacted pursuant to Section 5 are entitled to something akin to either *Chevron* deference¹² or substantial evidence review.¹³ The Constitution’s background rule in which the judiciary draws independent legal and factual conclusions regarding constitutional questions remains intact. To paraphrase *Marbury*,¹⁴ the judiciary independently must say what the law is and what the facts are.¹⁵

With respect to the second question, I want to suggest that Section 5 cedes to Congress the rather unremarkable authority to enact penalties for violations of the Fourteenth Amendment and the ability to create federal judicial and executive

10. U.S. CONST. amends. XIII, § 2; XIV, § 5; XV, § 2; XVIII, § 2; XIX, § 2; XXIII, § 2; XXIV, § 2 & XXVI, § 2.

11. Statutes enacted pursuant to Section 5 may embody legal and/or factual conclusions. For instance, if Congress provided that state higher education admission policies violate the Equal Protection Clause of Section 1 when such policies generate admission rates that are at variance from the college age population for racial groups located in a particular state, Congress would have made a legal conclusion about the scope of the Fourteenth Amendment. If Congress imposed penalties on particular state colleges based on a congressional finding that such colleges have violated the Fourteenth Amendment (say by tossing aside all minority applications), Congress would have embedded factual and legal findings in its legislation.

12. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (providing that if Congress has not spoken to a precise statutory question, judiciary must defer to an agency’s reasonable construction of law).

13. See 5 U.S.C. § 706(2)(E) (1994); see also *Consolidated Edison Co. v. National Labor Relations Bd.*, 305 U.S. 197, 229 (1938) (stating that agency decisions are supported by substantial evidence if “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion” exists in the record).

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

15. This Comment merely asserts that the enforcement provisions do not provide a sound basis for insisting that the judiciary must discard or give short shrift to its own interpretations of the Constitution or its own factual findings. It does not address whether the judiciary’s constitutional interpretations and findings are meant to govern the other branches. Whether the other branches heed or disregard a judicial determination is a separate and difficult issue and one not peculiar to the Fourteenth Amendment and its enforcement section. In fact, the arguments contained herein are consistent with either a judicial supremacy or a Paulsenian coordinacy approach. See generally Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

institutions charged with enforcing the Fourteenth Amendment. Given *Kentucky v. Dennison*,¹⁶ there quite likely were some apprehensions that in the absence of congressional “enforcement” authority, Section 1 might prohibit the states from denying equal protection of the laws, etc., but the federal government would be powerless to ensure that sanctions attached to state violations. In the words of *Dennison*, though state officers might have a “moral duty” arising from Section 1, there would be no federal means of compelling compliance with this duty.¹⁷ Under this view, Section 5 enforcement authority does not encompass the prerogative to enact broad prophylactic measures designed to prevent violations when the Fourteenth Amendment itself would not otherwise bar state legislation or action.¹⁸ Such legislation cannot be said to enforce the Fourteenth Amendment.

These answers are based largely on a textual approach to these questions. The arguments are tentative and incomplete as a thorough originalist treatment would focus more intensely on the original meaning of Section 5 of the Fourteenth Amendment and Section 2 of the Thirteenth Amendment.¹⁹ Moreover, given the limited scope of the inquiry, I will not comment on the Religious Freedom Restoration Act (“RFRA”)²⁰ generally or on the merits of *City of Boerne v. Flores*.²¹ Nor will I attempt to make sense of Sections 1 through 4 of the Fourteenth Amendment. *City of Boerne* contains so many rich issues—free exercise, incorporation, Section 5, separation of powers, federalism—that it would be foolhardy to try to comment on all of them.

I. SOME NOTES ON THE JUDICIAL ROLE

The federal judiciary could adopt any one of a number of frameworks when reviewing factual or legal conclusions embodied in legislation passed under

16. 65 U.S. (24 How.) 66, 77-80 (1860) (admitting that Ohio governor had a constitutional responsibility to deliver up a fugitive who had helped a Kentucky slave escape but denying that the federal government could compel a state officer to perform this duty), *overruled by* *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

17. *Id.* at 107.

18. In this respect, I view congressional authority more narrowly than the Supreme Court. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2163 (1997) (claiming that Congress can enact legislation deterring violations, even where conduct would not otherwise be unconstitutional).

19. U.S. CONST. amend. XIII, § 2.

20. This Comment does not examine the propriety of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), itself because that would entail an examination of the scope of the First Amendment’s Free Exercise Clause, U.S. CONST. amend. I, cl. 1.

21. *City of Boerne*, 117 S. Ct. at 2157. One can conclude that Section 5 does not cede to Congress some level of deference without subscribing to the Court’s free exercise jurisprudence. *See id.* at 2176 (O’Connor, J., dissenting) (agreeing that Congress lacks authority “to define or expand the scope of constitutional rights by statute,” while disagreeing with the disposition of the case because of her belief that RFRA merely enforces the free exercise clause rather than expanding it).

Section 5. A brief sketch of three such approaches to the judicial role will be useful before we consider our two questions. Likewise, a quick examination of the “default” approach that the judiciary ordinarily adopts when reviewing the constitutionality of federal legislation will prove instructive. If we understand how the judiciary customarily approaches its task, we can gauge whether Section 5 effects a departure from that default rule.

A. Three Approaches

A casual reader of Section 5 of the Fourteenth Amendment might be forgiven for adopting a rather narrow view of that Section’s delegated authority. The ability to “enforce” the rest of the Fourteenth Amendment using “appropriate” legislation seems rather inconsequential. Such language hardly seems to even hint that the judiciary must defer to Congress regarding either the meaning of the rest of the Fourteenth Amendment or whether States have violated that amendment’s prohibitions. In other words, the casual reader might be excused for concluding that the judiciary need not defer to Congress but must instead adopt a “De Novo” approach to the constitutionality of Section 5 legislation.

At the same time, the casual reader might be a bit puzzled. Enforcement is traditionally considered the province of the magistrates and not the legislature; the executive and the judiciary enforce the laws (including the Constitution). That Section 5 apparently assigns this role to Congress might seem extremely odd. Were Representatives or Senators to come to the defense of the freed slaves who were being discriminated against at the hands of the states? Were congressional committees to make arrests and conduct trials?

These perplexing questions might lead the casual reader to explore further, recognizing that like any provision of the Constitution, the Fourteenth Amendment should not be interpreted in a historical vacuum. The Amendment was enacted against the backdrop of a civil war fought, in part, on the notion that justice demanded that blacks be treated as the equals of whites in the eyes of the law. For far too long, the South had thumbed its nose at the concepts “that all men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights.”²² To remedy the situation, the Thirteenth, Fourteenth, and Fifteenth Amendments established a constitutional baseline of rights that states must respect and granted Congress seemingly unusual enforcement authority.

Given this historical context, perhaps Section 5 reflects an attitude that only Congress had the ability or the willingness to ride roughshod over recalcitrant states and that accordingly, Congress ought to have the exceptional authority to “enforce” the Amendment against the southern states.²³ After all, *Congress* is the branch empowered to enforce the Fourteenth Amendment, not the judiciary. Maybe there are some *expressio unius* implications of Section 5 that benefit

22. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

23. On this view, Section 2 of the Thirteenth Amendment would be the first instance where Congress was ceded exceptional enforcement authority.

Congress at the expense of the judiciary.²⁴ Indeed, the judiciary's decisions prior to the Civil War, such as *Dred Scott v. Stanford*,²⁵ perhaps led to a lack of confidence in mere judicial enforcement of the rights guaranteed by these amendments.

There are at least two ways of making sense of this supposed attitude. One framework insists that the judiciary must respect congressional conclusions regarding what the Fourteenth Amendment provides and whether the States have violated it. In the absence of a legislative determination, perhaps the judiciary can reach its own conclusions. But when Congress speaks via statute, the judiciary must heed Congress. Accordingly, on this view, Section 5 embodies a judgment by its ratifiers to leave enforcement in the hands of Congress and to preclude second-guessing by the judiciary. Very few subscribe to this theory of "Legislative Supremacy," where genuine judicial review of Section 5 legislation would be non-existent.

Many are more comfortable with the less breathtaking assertion that Congress must be entitled to some leeway or "play in the joints" when, pursuant to Section 5, it purports to enforce the rest of the Fourteenth Amendment. Under this "Judicial Deference" approach, the judiciary ought to accord some level of factual and/or legal deference to congressional statutes that arguably enforce the Fourteenth Amendment.²⁶ For instance, if Congress by statute finds that a particular state has denied blacks the equal protection of the law, a court, when presented with a case involving such a state, ought to approach the congressional statute with some level of deference for any congressional legal and factual findings contained in the statute. Such deference might be particularly appropriate in circumstances where there are a range of plausible legal and/or factual conclusions. Thus, if the First Amendment's Free Exercise Clause²⁷ is susceptible of two reasonable interpretations, one reflected in *Employment Division v. Smith*,²⁸ and one revealed in RFRA,²⁹ the judiciary arguably ought to acquiesce to the reasonable congressional interpretation, even if the Court believes its interpretation is superior. Likewise, if the judiciary could reach any one of a number of reasonable factual conclusions, the courts should defer to any reasonable finding embodied in congressional legislation. Congress does not

24. See RAOUL BERGER, *GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 221-29 (1977) (arguing that Section 5 raises questions as to whether the judiciary can even enforce the Fourteenth Amendment).

25. 60 U.S. (19 How.) 393 (1856).

26. For purposes of this Comment, it is unnecessary to characterize the level of deference the judiciary ought to afford to Congress under the theory of Judicial Deference.

27. U.S. CONST. amend. I ("Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof.").

28. 494 U.S. 872, 885-86 (1990) (holding that generally applicable, neutral laws that incidentally infringe upon free exercise rights do not violate the First Amendment).

29. The RFRA view of free exercise suggests that substantial burdens on free exercise are only justified if there is a compelling governmental interest for the burden and the burden is the least restrictive means of achieving the governmental interest. 42 U.S.C. § 2000bb-1(a)(b) (1994).

have the final authority to say what the law is or what the facts are, but it can make legal and factual findings and expect that the courts will defer to those findings in appropriate circumstances.

Thus there are at least three approaches to understanding the judicial role in reviewing congressional legislation passed pursuant to Section 5: De Novo, Judicial Deference, and Legislative Supremacy.³⁰

B. The Default Judicial Approach to Constitutional Questions

As noted earlier, we should try to understand how the judiciary approached its interpretational task prior to the enactment of the "enforcement" provisions. Had there been a tradition of Legislative Supremacy or, at the very least, Judicial Deference to congressional understandings of the Constitution, there would be sound reason to read Section 5 against this background rule of judicial supineness. Alternatively, had there been a custom of De Novo judicial determination of the constitutionality of congressional enactments, then we must analyze whether Section 5 and the other enforcement provisions changed the default rule of De Novo judicial review.

Prior to the adoption of the Civil War Amendments,³¹ courts generally approached constitutional disputes pertaining to congressional statutes with a De Novo approach.³² That is, the courts independently determined whether a federal statute violated the Constitution. To be sure, the judiciary occasionally applied a presumption of constitutional regularity to federal legislation.³³ Because the judiciary was reviewing the actions of a coordinate branch of the federal

30. Professor Amar points out a fourth approach. Section 5 legislation may force the judiciary to reconsider prior judicial interpretations of Sections 1 through 4. In other words, Congress may tell the courts to ignore precedents. Akhil Amar, *Intertextualism*, 112 HARV. L. REV. (forthcoming Jan. 1999). See also Stephen Carter, *The Morgan Power and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 824 (1986). Because I question the judiciary's practice of adhering to their precedent when called upon to construe the *Constitution*, I do not discuss Professor Amar's interesting suggestion.

31. U.S. CONST. amends. XIII-XV.

32. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80 (independently determining whether Congress improperly granted the Supreme Court the ability to issue writs of mandamus). See also THE FEDERALIST NO. 78 at 395 (Alexander Hamilton) (Garry Wills ed., Bantam 1982) ("The interpretation of the laws is the proper and peculiar province of the courts . . . It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."). But see *id.* at 394 (discussing the judicial duty to strike down laws against "manifest tenor" of the Constitution). Interestingly, *Marbury* also adopted a De Novo approach in considering James Madison's refusal to deliver William Marbury's commission. *Marbury*, 5 U.S. (1 Cranch) at 155-62.

33. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) ("An exposition of the Constitution, deliberately established by legislative acts . . . ought not be lightly disregarded."). *McCulloch*, however, also makes clear that the Court will strike down unconstitutional laws. *Id.* at 423 (discussing "painful duty").

government, the Court perhaps was willing to cede congressional legislation “the benefit of the doubt” by presuming constitutionality and placing a burden on the plaintiff to show otherwise.³⁴

Were the other branches supposed to accede to judicial constructions of the Constitution? Professor Paulsen has argued that, as original matter, each branch was to arrive at its own view of the constitutionality of measures and actions without the need for deference to its coordinate branches (he calls this the “Postulate of Coordinacy”).³⁵ Citing numerous passages in the *Federalist Papers*, the writings of Thomas Jefferson, Andrew Jackson, other luminaries, and *Marbury v. Madison*,³⁶ Paulsen persuasively challenges the modern acquiescence to judicial supremacy.³⁷

Of course, some thought that the judiciary would be supreme in construing the Constitution and that other branches were bound to follow the federal judiciary’s view of the Constitution. The Anti-Federalist Brutus charged that the Constitution would make the federal judiciary truly supreme: “The opinions of the supreme court . . . will have the force of law; because there is no power provided in the constitution, that can correct their errors or controul their adjudications.”³⁸ Perhaps in response to Brutus, Hamilton admitted that “interpretation of the laws [including the Constitution] is the proper and *peculiar* province of the courts.”³⁹ Like Brutus, Justice Joseph Story in his famous *Commentaries on the Constitution* asserted that the “Final Judge or Interpreter in Constitutional Controversies” was the federal judiciary: The Supreme Court’s interpretation “becomes obligatory and conclusive upon all the departments of the Federal government.”⁴⁰ Finally, there is *Marbury v. Madison*,⁴¹ which many people, rightly or wrongly, equate with judicial supremacy.⁴²

34. Thomas Jefferson invoked a similar proposition in concluding that President George Washington should sign the Bank of United States bill unless he was “tolerably clear” that it was unconstitutional. PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 14 (Little, Brown 3d ed., 1992) (quoting Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 PAPERS OF THOMAS JEFFERSON 275, 279-80 (Library of Congress 1974)).

35. Paulsen, *supra* note 15, at 228.

36. 5 U.S. (1 Cranch) 137 (1803).

37. Paulsen, *supra* note 15, at 228-63.

38. *Essays of Brutus*, No. XI, in 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST § 2.9.138 (University of Chicago Press 1981). For a general discussion of the fears of the Anti-Federalists, see Paulsen, *supra* note 15, at 245-46 & ns.94-100.

39. THE FEDERALIST NO. 78 at 395 (Alexander Hamilton) (Garry Wills ed., Bantam 1982) (emphasis added).

40. JOSEPH STORY, *Commentaries on the Constitution*, in 1 STORY ON THE CONSTITUTION § 383 (Melville M. Bigelow, ed., 5th ed., 1891).

41. *Marbury*, 5 U.S. (1 Cranch) at 137.

42. In *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the Court asserted that *Marbury*, 5 U.S. (1 Cranch) at 137, “declared the basic principle that the federal judiciary is supreme in the exposition of the law in the Constitution.” While this reading of *Marbury* is wrong, we should not be

But the point not to be lost is that whatever the view of judicial power and constitutional interpretation (whether the judiciary was supreme or no different than the other branches), the courts generally engaged in a De Novo review of the constitutionality of federal action.⁴³ In fact, early discussions of judicial review of congressional actions assumed that the courts would stand athwart the "impetuous vortex"⁴⁴ and declare null and void congressional usurpations of authority.⁴⁵ A contrary rule of judicial supineness would have been unthinkable. Indeed, to have introduced an element of deference to judicial review of congressional statutes only would have emboldened the legislative "vortex" at the expense of the least dangerous branch and made the judiciary's task of enforcing limits on congressional authority all the more difficult.⁴⁶ That is why Hamilton hailed the judiciary as the "bulwarks of a limited Constitution"⁴⁷ and scoffed at the notion that the judiciary must defer to congressional constructions of the Constitution.⁴⁸

II. TEXT, STRUCTURE, AND A LITTLE BIT OF HISTORY

In this section, we examine whether Section 5 alters the default rule of De Novo judicial review by somehow requiring judicial deference to congressional factual and legal conclusions regarding possible violations of the Fourteenth Amendment. We also consider the scope of enforcement authority more generally. Of course, our inquiry into the question of deference must be de novo. We ought not apply an approach (deference) that assumes an answer to the very question that we wish to resolve, i.e., whether congressional constructions of Section 5 and the rest of the Fourteenth Amendment are entitled to deference.

A. Section 5 Does Not Entitle Congress to Any Deference

1. *Congress and Legislation.*—Many people understandably believe that if any branch is entitled to deference, it must be Congress. After all, *Congress* may enact appropriate enforcement legislation. Because Section 5 did not revolutionize our federal sausage-making process, however, Section 5 legislation must satisfy bicameralism and presentment.⁴⁹ Accordingly, when Section 5 speaks of Congress, we must recognize that it actually refers to both Congress

surprised that others might have viewed *Marbury* in a similar light.

43. For that matter, I am not aware of anyone suggesting that the Executive's construction of the Constitution is entitled to deference or supremacy from the other branches.

44. THE FEDERALIST NO. 48, at 251 (James Madison) (Garry Wills ed., Bantam 1982).

45. See generally John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

46. See THE FEDERALIST NO. 44, at 230 (James Madison) (Garry Wills ed., Bantam 1982) (discussing the judiciary's responsibility to oppose legislative usurpations).

47. THE FEDERALIST NO. 78, at 397 (Alexander Hamilton) (Garry Wills ed., Bantam 1982).

48. See *id.* at 395 (discussing spurious claim that Congress is the "constitutional judge[]" of its own power).

49. See *INS v. Chadha*, 462 U.S. 919, 951 (1983).

and the President. If Congress must receive deference for its constructions and findings under the Fourteenth Amendment, then surely the President must be entitled to his two cents of deference as well. But if there is a divergence of opinion as to the findings of law or fact, what then? Should the President disagree with congressional findings made in committee reports or hearings, there seems to be no natural way of definitively resolving the conflict between Congress and the President.

Perhaps the answer lies in the judiciary deferring only to the text of legislation rather than paying heed to committee reports and committee hearings.⁵⁰ After all, Congress has the power to enforce by passing legislation, not by making findings *simpliciter*. Presumably when Congress makes factual findings and legal conclusions in the text of the bill and the President signs the bill into law, all relevant parties are “on board.” Likewise, if the President does not sign a bill into law, but it becomes law nonetheless by reason of a veto override, that is all that matters for purposes of Section 5. To refine the pro-deference claim: Congress is not entitled to deference. Only federal legislation enacted pursuant to Section 5 should benefit from any deference.⁵¹

2. *Enforce*.—Congress may pass legislation that only *enforces* the rest of the Fourteenth Amendment. “Enforce” hardly seems to connote the ability to instruct other branches regarding what the law is or what the facts are. But even if we thought it might confer some deference, the broad swath cut by the claim of deference militates against it. Reading “enforce” as though it cedes deference in Section 5 has rather problematic implications for the rest of the Constitution.

First, one must recognize that if “enforce” connotes some level of deference with respect to Section 1, it must perform a similar role with the entire Fourteenth Amendment. For example, if Congress must enjoy judicial deference regarding the meaning or scope of the Privileges and Immunities Clause⁵² in Section 1, Congress must enjoy some leeway for its interpretation of Section 4 of the Fourteenth Amendment.⁵³ With such authority, Congress might have made it more difficult to prove that a particular debt was federal or authorized by law.⁵⁴ Similarly, Congress could have enacted legislation embodying factual findings regarding whether the federal government or a state could satisfy a claim stemming from an alleged Confederate debt.⁵⁵ Congress even might have

50. This argument merely parallels the arguments for treating only the text of federal statutes as law to be applied by the other branches.

51. Notwithstanding this refinement, this Comment will continue to refer to “Congress” seeking deference to its legal or factual conclusions.

52. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

53. U.S. CONST. amend. XIV, § 4.

54. U.S. CONST. amend. XIV, § 4 (“The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”).

55. See U.S. CONST. amend. XIV, § 4 (“But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United

weakened the exclusion of former rebels from government service by simple majority votes.⁵⁶ Deference to congressional views of Sections 3 and 4 might seem quite troubling.⁵⁷

"Enforce" also must convey deference with respect to the other amendments where it is found.⁵⁸ The word is first mentioned in Section 2 of the Thirteenth Amendment.⁵⁹ Virtually identical language is found in numerous amendments to the Constitution, namely Sections 2 of the Fifteenth, Eighteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments.⁶⁰ In all these provisions, Congress may "enforce" the relevant amendment with "appropriate legislation."⁶¹

While the Civil War Amendments⁶² might seem appropriate candidates for

States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.").

56. See U.S. CONST. amend. XIV, § 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any States, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Id.

57. Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting) (asserting that deference might enable Congress "to dilute equal protection and due process").

58. Not much is made of the fact that Section 1 of the Fourteenth Amendment also uses "enforce"—"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. Clearly, the word carries no special connotation of deference in this context because this provision does not empower the states in any way. Rather it limits their authority by denying the power to enforce certain laws.

59. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

60. See U.S. CONST. amends. XV, § 2; XVIII, § 2; XIX, § 2; XXIII, § 2; XXIV, § 2; XXVI, § 2. There are minor variations. Most provisions state that "Congress shall have the power to enforce this article by appropriate legislation." See, e.g., U.S. CONST. amend. XIII, § 2. The Fourteenth Amendment reads slightly differently, "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," U.S. CONST. amend. XIV, as does the Eighteenth Amendment: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." U.S. CONST. amend. XVIII. Despite these minor variations, we arguably ought to treat these provisions as ceding the same type of authority to Congress.

61. Although these "enforcement" provisions were ratified over the course of more than 100 years, presumably the same meaning must be given to all such provisions since almost identical language is used throughout the Constitution.

62. U.S. CONST. amends. XIII-XV.

judicial deference to congressional legislation that “enforces” such amendments (notwithstanding the discussion above), the other amendments seem ill-suited for deference. For instance, it is hard to imagine that there was a perceived need for Legislative Supremacy or Judicial Deference with respect to the enforcement of the voting age requirement (the Twenty-sixth Amendment)⁶³ or the District of Columbia’s selection of presidential electors (the Twenty-third Amendment).⁶⁴

Moreover, one must make sense of Section 2 of the Eighteenth Amendment, which gave Congress *and* the states the concurrent power to enforce the prohibition against liquor.⁶⁵ If Congress was entitled to deference because it could have enforced the Eighteenth Amendment, the states would have benefitted from judicial deference as well. If states were entitled to deference, however, each state could have established its own interpretation of the Eighteenth Amendment and the courts would have been bound to defer to these multiple constructions.⁶⁶ In effect, we could have had a substantively different Eighteenth Amendment in the several states. It is hard to believe that the Amendment accorded deference to *both* Congress and the states.⁶⁷

Finally, if we treat “enforce” as roughly analogous to “execute,”⁶⁸ we can draw some more troubling analogies. The President has the “Executive Power”⁶⁹ to enforce federal laws and has the correlative duty to ensure that such laws are

63. U.S. CONST. amend. XXVI.

64. U.S. CONST. amend. XXIII.

65. “The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.” U.S. CONST. amend. XVIII, § 2, *repealed by* U.S. CONST. amend. XXI, § 1.

66. The analogous situation in administrative law is hard to envision. Congress would have to delegate *Chevron* authority with respect to the meaning of a statute to several administrative agencies. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

67. If a conflict were to arise, Congress’ interpretation (as reflected by statute) presumably would supersede the state enactments because federal laws, when made pursuant to the Constitution, benefit from the Supremacy Clause. U.S. CONST. art. VI, § 2. So long as Congress had not spoken, however, we could have had the specter of the Eighteenth Amendment applied differently in the several states.

68. *The Federalist Papers* treat the words rather similarly. THE FEDERALIST NOS. 12 (discussing the new methods “to enforce” tax laws that had been in vain), 15 (commenting on difficulty of seeing laws “enforced” against the States), 21 (complaining that Congress lacked the ability to “enforce” its laws), and 27 (discussing using state institutions to help in “enforcement” of federal laws) (Alexander Hamilton).

The words are not precisely synonymous because “execute” seems to have a broader meaning. Magistrates enforce the law usually *against* someone, whereas execution can refer to carrying out laws that only apply to the executive. For instance, it seems awkward to say that the executive branch “enforces” the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552-559 (1994 & Supp. II 1996), on itself. Rather it sounds more appropriate to say that the executive branch “executes” FOIA when it complies with it.

69. U.S. CONST. art. II, § 1, cl. 1.

“faithfully executed.”⁷⁰ No one supposes that the Constitution provides that the President is entitled to either factual or legal deference with respect to the execution of federal laws. Executive findings of fact and law often do receive deferential judicial review, but such deference is a result of federal statutes rather than by reason of the Constitution itself.⁷¹ Moreover, notwithstanding the fact that the Constitution is law that binds the President and that the President must enforce all federal law, no one believes that the President’s views of the Constitution are entitled to deferential judicial review.⁷² And for good reason—though the power to enforce necessarily includes the power to interpret (for one cannot enforce the law without interpreting it), enforcement power does not include the authority to demand deference to enforcement constructions.⁷³ Likewise, Section 5 enforcement power should not be read as implicitly ceding some level of deference to Congress.

3. *Appropriate.*—Whatever the import of enforce, congressional legislation must be “appropriate.” An appropriateness inquiry can hardly confer deference to congressional determinations. In fact, the requirement of “appropriate” legislation is clearly a *limitation* on legislative authority, not language meant to empower Congress. Thus, even if we believe that “enforce” connotes some level of deference, the appropriateness requirement might suggest the opposite conclusion. Perhaps someone else outside of Congress (the courts) must determine independently whether federal legislation is appropriate.

4. *Comparisons to Other Provisions.*—If Section 5 means to grant some deference to Congress, it does so in a rather oblique manner. Other constitutional provisions meant to cede an issue to another branch are fairly explicit about such aims. For example, Article I, Section 9 permitted the States to determine how many slaves they wanted to import (as they “shall think proper to admit”).⁷⁴ Similarly, the President decides whether to propose laws for congressional consideration (“as he shall judge necessary and expedient”)⁷⁵ and how long to

70. U.S. CONST. art. II, § 3.

71. See generally Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511 (explaining that *Chevron* deference to agency constructions of law is justified by reference to legislative intent not Constitution); 5 U.S.C. § 706(2)(E) (1994) (providing substantial evidence review of fact-finding when facts are found through formal procedures of 5 U.S.C. §§ 556, 557 (1994)).

72. The Constitution is law. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (asserting that the Constitution is a “superior, paramount law”). The President is charged with enforcing the law. See U.S. CONST. art. II, § 1, cl. 1, and § 3. It follows that the President must enforce the Constitution. Cf. Bruce Ledewitz, *The Power of the President to Enforce the Fourteenth Amendment*, 52 TENN. L. REV. 605 (1985) (discussing why the President should be able to enforce the Fourteenth Amendment absent an express legislative statement to the contrary).

73. Because the judiciary enforces or executes the Constitution and laws of the United States as well, we would once again run into the problem of multiple authoritative interpreters. See *supra* notes 65-66 and accompanying text.

74. U.S. CONST. art. I, § 9, cl. 1.

75. U.S. CONST. art. II, § 3.

adjourn Congress (as “he shall think proper”).⁷⁶

In some instances, Congress actually has the final word. Congress determines (as “they think proper”) whether the appointment of inferior officers will be left with the President, the Courts, or the Department Heads⁷⁷ and whether to propose constitutional amendments (as they “shall deem it necessary”).⁷⁸ Likewise, the House has the “sole power of Impeachment,”⁷⁹ while the Senate has the “sole power to try all Impeachments.”⁸⁰ Accordingly, the courts cannot interfere with or second-guess these processes.⁸¹ In each of these circumstances, the relevant constitutional actors make decisions and no other branch may interfere.

Professor Van Alstyne aptly has observed that similar sections⁸² “stand in contrast, not in parity with” Section 5.⁸³ Section 5 does not cede to Congress the “sole” authority to deem what is appropriate legislation for the enforcement of the Fourteenth Amendment. Nor does Section 5 permit Congress to pass legislation as “they shall think proper.” Section 5 certainly does not provide that “congressional legal and factual conclusions relating to the Fourteenth Amendment are entitled to deference.” In short, nothing in Section 5 or the other enforcement provisions resembles these textual commitments of authority.⁸⁴

5. *Necessary and Proper Clause.*—Notwithstanding the discussion above, there is a provision in the Constitution that is sometimes perceived as ceding to Congress some measure of deference with respect to the means employed: The Necessary and Proper Clause.⁸⁵ Pursuant to the Clause, Congress may enact laws “necessary and proper for carrying into execution” the powers of the federal government.⁸⁶

The similarity between the Necessary and Proper Clause and Section 5 cannot go unnoticed. Both provisions delegate to Congress the power to pass

76. U.S. CONST. art. II, § 3.

77. U.S. CONST. art II, § 2, cl. 2.

78. U.S. CONST. art. V.

79. U.S. CONST. art. I, § 2, cl. 5.

80. U.S. CONST. art. I, § 3, cl. 6.

81. See generally *United States v. Nixon*, 506 U.S. 224 (1993).

82. Professor Van Alstyne points to yet another section, Article I, Section 5, Clause 2 which states that, “each House may determine the Rules of its Proceedings.” William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act under Section 5 of the 14th Amendment*, 46 DUKE L.J. 291, 318 & n.79 (1996).

83. *Id.* at 318.

84. While the difference between Section 5 and these other provisions may cause the Legislative Supremacist to unfurl the white flag, the proponent of Judicial Deference may not be persuaded. After all, those who subscribe to Judicial Deference believe in some judicial role, not absolutely none.

85. U.S. CONST. art. I, § 8; cl. 18.

86. U.S. CONST. art. I, § 8, cl. 18.

appropriate legislation in order to ensure that certain ends are achieved.⁸⁷ Both seem to be measures designed to ensure that the federal government has the wherewithal to see to it that other constitutional provisions are not empty letters.

Of course, there are some differences. In one provision, the laws need only be appropriate enforcement legislation. In the other, the laws must be necessary, proper, and carry into execution a federal power. The omission of "necessary" should not lead us to conclude that Section 5 of the Fourteenth Amendment confers a broader scope of authority than the Necessary and Proper Clause. Indeed, history indicates that Section 5 and Section 1 of the Fourteenth Amendment were originally combined into one clause which merely granted Congress the authority to "make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."⁸⁸ At least one House member objected that the Amendment was not self-executing⁸⁹ because it required federal legislation before the States were constrained in any way. Others, however, objected to the scope of authority ceded to Congress, charging that Congress would possess the authority to enact legislation to protect life, liberty, and property generally.⁹⁰ The Amendment was eventually redrafted, congressional authority was separated and the restrictions on state authority were made stand-alone provisions. This history suggests that Section 5 may have been meant to be a Necessary and Proper Clause for the Fourteenth Amendment, notwithstanding the elimination of the "necessary" restriction.⁹¹

Even if this conclusion is wrong, however, and Congress enjoys more freedom in regard to Section 5 of the Fourteenth Amendment than it does with respect to the Necessary and Proper Clause, nothing suggests that Congress is entitled to deference. Even without "necessary," Section 5 merely empowers Congress to pass appropriate enforcement legislation. Indeed, neither Section 5 of the Fourteenth Amendment nor the Necessary and Proper Clause dictates or even suggests that Congress' views on the constitutionality of legislation relying

87. Compare U.S. CONST. art. I, § 8, cl. 18 (authority to "carry into execution" powers of federal government), with U.S. CONST. amend. XIV, § 5 (power to "enforce" provisions of Fourteenth Amendment).

88. CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866). John Bingham proposed the original language. *Id.*

89. See *id.* at 1095.

90. See generally EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND THE CONGRESS, 1863-1869, 56-59 (1990).

91. Maltz and Van Alstyne make a convincing case that many opposed Bingham's original Amendment out of fear that it empowered Congress too much. See *id.*; Van Alstyne, *supra* note 82, at 299. In their view, such opposition led to the reworking of the Amendment and suggests that whatever authority Congress has under Section 5 of the Fourteenth Amendment, it is not as broad as it would have been absent the changes that were made. They may be right, but even if Congress has necessary and proper authority with respect to the Fourteenth Amendment, such authority still does not privilege congressional interpretations or applications of the Fourteenth Amendment.

upon such clauses should receive deference from the other branches. Like most authority delegated to Congress,⁹² Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause make a simple delegation of legislative power to Congress. No reason exists for deferring to congressional constructions of the clause granting Congress authority to ban the counterfeiting of money⁹³ and similarly, no reason exists to defer to Congress with respect to the Fourteenth Amendment's meaning or application. To be sure, in the course of exercising its legislative powers, Congress must interpret the Constitution to obtain a sense of the scope of its authority. Nonetheless, other branches need not defer to congressional determinations of congressional power.

Indeed, in contrast to other provisions, such as the power to establish post offices⁹⁴ or the authority to issue patents,⁹⁵ both the Necessary and Proper Clause and Section 5 arguably are *more restrictive* with respect to congressional authority. Congress cannot pass any enforcement legislation it pleases. It must be *appropriate* legislation. When Congress enacts patent or postal legislation, however, Congress is not so encumbered. Presumably, no one can claim, as a constitutional matter, that patent terms set by statute are "inappropriately" too short or too long. In this sense, Section 5 and the Necessary and Proper Clause actually seem to confer constrained authority to Congress as compared to other sections that do not contain such limitations. Accordingly, Congress' authority to issue patents along with the rest of Article I, Section 8 (save Clause 18) are much better candidates for deferential judicial or executive review than is legislation passed pursuant to Section 5 or the Necessary and Proper Clause.

While Section 5 seems unusual at first blush because it grants "enforcement" authority to Congress, it really is just a variant of the Necessary and Proper Clause. In the end, Section 5 merely confers the legislative power to pass particular types of laws (appropriate enforcement legislation), not authority to issue authoritative constitutional interpretations and not an exceptional ability to find facts.

B. The Scope of the Power to Enforce by Appropriate Legislation

Thus far, we have highlighted some reasons why Section 5 of the Fourteenth Amendment should not be read as entitling Congress to legislative supremacy or deference. The more significant question remains: What does Section 5 permit Congress to do?⁹⁶ As mentioned earlier, the answers are tentative. A definitive

92. I say "most" because the provisions discussed earlier seem to preclude judicial review. See *supra* notes 77-83 and accompanying text.

93. U.S. CONST. art. I, § 8, cl. 6.

94. U.S. CONST. art. I, § 8, cl. 7.

95. U.S. CONST. art. I, § 8, cl. 8.

96. The discussion that follows is meant to lay out some tentative views about the proper scope of congressional power under Section 5 of the Fourteenth Amendment. Even if all three branches agreed with the assertions contained herein, there would still be disagreements about the constitutionality of legislation passed pursuant to Section 5. Given varying interpretations of the

treatment must await more extensive historical inquiry.

1. *Circumscribed Enforcement Authority.*—Section 5 of the Fourteenth Amendment certainly empowers Congress to establish executive and judicial institutions that are designed to enforce the terms of the Amendment. For example, Congress could institute special courts to hear only Fourteenth Amendment claims. By the same token, Congress could establish a separate bureau or department charged with assisting the President in the enforcement of the Fourteenth Amendment. Undoubtedly, Congress also may attach penalties to the violation of the Amendment. Thus, Congress could criminally sanction any state officials who violate an individual's equal protection rights and create executive and judicial magistrates to ensure punishment.

Perhaps Congress also could conclude that a state or several states violated a particular provision of the Fourteenth Amendment. For example, Congress might provide that a state has violated the Privileges and Immunities Clause because it restricts entry into certain professions or trades. Additionally, Section 5 might sanction a congressional ability to rewrite state legislation that runs afoul of the principles embodied in the Fourteenth Amendment.⁹⁷ Thus, if a state statute on its face denied equal protection, presumably Congress could enforce the Equal Protection Clause by rewriting or amending the statutory language.⁹⁸ Of course the judiciary would review all such legislation *de novo* and determine whether the facts and the law support any federal statute.

What of the supposed congressional authority to define the content of the rest of the Fourteenth Amendment? As maintained earlier, Congress lacks such authority. With respect to the assertion of definitional authority, this claim is just another way of insisting that Congress has the authority to demand deference to Congress' conclusions about the import of the Fourteenth Amendment. To borrow from what Professor Redish has said in a related context, Section 5 does not permit Congress to define "persons" to include armadillos or bananas.⁹⁹

Prophylactic legislation is problematic as well. As noted, Congress can attach penalties and disabilities for actual violations and such measures will tend to deter violations. But the Court is wrong when it concludes that Congress has general authority to enact legislation designed to "prevent" or to "deter" Fourteenth Amendment violations.¹⁰⁰ Contrary to the Court's view, Congress

rest of the Fourteenth Amendment, disputes about whether something truly enforces the Fourteenth Amendment will continue. That is why Justice O'Connor is able to agree with the Court's relatively narrow construction of Section 5 yet still dissent on the grounds that Congress actually was enforcing the Free Exercise Clause. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2176 (1997) (O'Connor, J., dissenting).

97. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2768-69 (1866).

98. In some sense, this is what courts do when faced with a state statute that, on its face, denies equal protection.

99. Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 25-26 (1987). The assertion was made about judicial power, but the same point should be made with respect to congressional power.

100. *See City of Boerne*, 117 S. Ct. at 2163, 2164.

lacks the authority to prohibit “conduct which is not itself unconstitutional.”¹⁰¹ In the guise of enforcing the Fourteenth Amendment, Congress cannot “prevent” violations by insisting that states render more process than the Due Process Clause requires. Nor can Congress compel greater protection than the Equal Protection Clause affords. Section 5 simply does not cede to Congress an ability to create a protective “bubble zone” around the rest of the Fourteenth Amendment.

To see why this is so, consider a traffic officer and a speed limit. Suppose the state legislature establishes a speed limit of sixty-five-miles-per-hour. When the traffic officer tickets those who have exceeded the speed limit, we all agree that the traffic officer enforces the law. Should the traffic officer ticket those who zoom along at sixty-three-miles-per-hour, however, there is no sense in which the traffic officer is enforcing the speed limit. Even if the traffic officer pleads that stopping people short of the speed limit is a measure reasonably designed to enforce the speed limit, his arguments will fall on deaf ears.

Similarly, prior to the adoption of the Twenty-first Amendment, Congress might have concluded, rather sensibly, that drug use often led to liquor consumption, but that conclusion could not possibly have ceded to Congress the authority to prohibit drug use as a measure designed to “enforce” the Eighteenth Amendment. Had Congress banned drugs pursuant to the Eighteenth Amendment under the guise of enforcing that Amendment, it would have deserved a slap on the legislative wrist.

Likewise, when Congress requires that states recognize certain rights not already protected by the Fourteenth Amendment, Congress does not enforce the Fourteenth Amendment. Rather, Congress must be viewed as enforcing an amendment of its own making, which is to say that Congress is enforcing nothing but its own will. Congress lacks the authority to “enforce this Amendment and to enact legislation reasonably designed to prevent violations.”¹⁰²

2. *Redundant Enforcement Authority.*—Even in the absence of Section 5 of the Fourteenth Amendment, one might suppose that Congress, by virtue of the Necessary and Proper Clause, already possessed the rather circumscribed authority discussed above. After all, surely the federal government enjoyed the general authority to enforce the Constitution (including the Fourteenth Amendment) against states. As noted earlier, the President and the courts have the power to enforce the Constitution. If those branches have the power to enforce it, then Congress, by virtue of the Necessary and Proper Clause, can enact laws to carry into execution the other branches’ enforcement authority.

Yet perhaps people doubted that Congress, under the aegis of the Necessary and Proper Clause, could enforce the Fourteenth Amendment by creating executive and judicial enforcement apparatus and by imposing penalties. As

101. *Id.* at 2164 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

102. Compare U.S. CONST. amend. XIV, § 5 (stating, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”), with 15 U.S.C. § 78n(e) (1994 & Supp. II 1996) (granting to Congress the power to “define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative”).

noted earlier, *Kentucky v. Dennison*¹⁰³ contained some rather astonishing language relating to federal enforcement of the Fugitive Clauses.¹⁰⁴ In Kentucky, Mr. Willis Lago had been charged with enticing Charlotte, a slave, to escape her owner. Mr. Lago subsequently fled to Ohio.¹⁰⁵ Invoking Article IV, Section 2, Clause 2, and a federal act designed to enforce the Clause,¹⁰⁶ Kentucky requested that the Governor of Ohio deliver a fugitive to the Governor of Kentucky. The Governor of Ohio refused to deliver Mr. Lago even after receiving a copy of the bill of indictment.¹⁰⁷ Kentucky brought a suit in the Supreme Court asking that the Court mandamus the Ohio governor. The Court, while acknowledging that the Ohio governor had a "moral duty" to hand over Mr. Lago,¹⁰⁸ nevertheless concluded that the federal government could not compel adherence to such duty. The federal government

has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.¹⁰⁹

In other words, though there was a constitutional duty, there was no sanctioned means of compelling adherence to that duty.

Today, we recognize that *Dennison* was wrongly decided.¹¹⁰ Of course the federal government may compel compliance with a state's obligations under the Constitution. The Constitution's restrictions on state authority are not merely moral duties, but legal obligations and limitations that must be observed *and* that can be enforced. Given *Dennison*, however, perhaps the framers of the Fourteenth Amendment did not wish to establish yet another merely moral duty on state officers. Federal safeguarding of equal protection, due process, and privileges and immunities might be empty promises if the federal government could not enforce such provisions and attach penalties for non-compliance. On this view, Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment merely reflect the *Dennison* view that the federal government needs specific authority to coerce compliance from the States. In other words, a redundant provision was enacted, because it was not viewed as redundant at the time by the courts and perhaps by the political branches. To

103. 65 U.S. (24 How.) 66 (1860), *overruled by* *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

104. U.S. CONST. art. IV, § 2, cls. 2, 3.

105. *See Dennison*, 65 U.S. (24 How.) at 67.

106. *See* Fugitives Act of 1793, 1 Stat. 302, § 1.

107. *See Dennison*, 64 U.S. (24 How.) at 70.

108. *Id.* at 107.

109. *Id.* at 107-08.

110. *See* *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987), *overruling* *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860).

remove all doubts, Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment make clear that those amendments generally are not merely moral commands but federally enforceable against the States and individuals. The enforcement provisions, then, overturn *Dennison's* cramped reading of federal authority.

CONCLUSION

While the Fourteenth Amendment generally is acknowledged to be particularly opaque, Section 5 itself does not seem to suffer from such nebulousness. One should be able to derive an understandable meaning of Section 5 and the other enforcement provisions. I have tried to sketch the outlines of a textual case for a rather limited view of the enforcement power. On this view, Congress should not be accorded something akin to *Chevron* deference for its constructions of the Fourteenth Amendment or to substantial evidence review for factual findings that underlie Section 5 legislation. But the case is hardly proven. Before reaching more definitive conclusions, we would need to undertake an extensive analysis to see what these words meant at enactment. Nevertheless, the power to enforce with appropriate legislation seems like a rather poor font for deference to legislative constructions and findings. If Congress is to be even a somewhat authoritative judge of its own power, surely there must be a clearer indication that the Constitution means to undermine our system of independent judicial review of federal legislation.

BOOK REVIEW

THE ILLUSORY NATURE OF ENVIRONMENTAL PROTECTION IN A MARXIST-SOCIALIST POLITY: THE CASE OF POLAND

MICHAEL J. KELLY*

Review of Daniel H. Cole,** *INSTITUTING ENVIRONMENTAL PROTECTION: FROM RED TO GREEN IN POLAND*, MacMillan Press Ltd., London; St. Martin's Press, Inc., New York (1998).

It spurts yellowish-brown from the tap, laced with heavy metals, coal-mine salts and organic carcinogens. It stains the sink, tastes soapy and smells like a wet sock that has been fished out of a heavily chlorinated swimming pool. Given a few weeks, it will eat a hole in a steel pan. Better to wear rubber gloves while washing the dishes. Better to boil it before cooking. Best not to drink it. Tap water drips daily into the collective consciousness of Warsaw as part of the pernicious legacy of four decades of communism. The water is a long goodbye from a totalitarian system that scorned environmental common sense and poisoned people in the name of the masses . . . each morning's grungy dribble from the tap is a dispiriting reminder that political freedom and free-market economics offer no quick cure for a catastrophically fouled environment.¹

INTRODUCTION

When I told a colleague that I was penning a review of a book on environmental protection in Poland, he looked at me quizzically and asked whether that was an oxymoron, along the lines of "military intelligence." Indeed,

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1. Blaine Harden, *Poland Faces Communist Legacy of Pollution; Water that Burns Skin is a Reminder that Freedom is No Quick Cure for Fouled Environment*, WASH. POST, Dec. 15, 1991, at A33.

that was the case in Poland, as well as the rest of the Soviet Bloc, until the 1990's; severe environmental degradation was a way of life in that part of the world. An explanation of why there was an abject failure to protect the environment under Soviet-style regimes is what this book is about. Here, Professor Daniel Cole uses Poland as a "case study" to explain the causes and note the effects of socialism's failure to protect the environment, and to show that this failure "was inevitable given certain features of Marxist-Leninist ideology, the socialist economic system and single-party rule."² In other words, Poland is employed as a microcosm through which we can see the whole picture with a clearer understanding of what went wrong, and why.

Professor Cole's organizational scheme reveals a clever approach to this topic, and I found the "road-maps" that he uses to introduce each chapter very helpful. After dedicating the first two chapters to a description of Communist Poland's ecological crisis and the history of environmental law in that country, Cole quickly moves on to his "explanatory chapters" (three through six), which detail four causalities for the ultimate failure to protect the environment: (1) the un- or non-enforceability of environmental laws; (2) Communist Party politics; (3) state-controlled socialist economics; and finally (4) Marxist ideology. These are, I believe, the most interesting parts of the book, as they describe the underlying reasons for Communist Poland's failure to protect its environment. Cole does a fine job of reducing somewhat tricky and convoluted concepts into understandable and logical analysis. While I might be inclined to reverse the ordering of these chapters, the information that they disseminate is important.

Chapters seven and eight round out the book with an examination of environmental protection in post-Communist Poland and some institutional suggestions. Those suggestions in the last chapter, centered on increased property rights, capitalistic pricing mechanisms and rule of law theory, effectively unmask Professor Cole as a savant of the free-market environmentalism school. Consequently, one can look back with a view to the entire work from that perspective. Nonetheless, this should not detract from the value of the book on the whole, whatever the reader's political leanings. The book is an excellent case study of environmental protection issues in Poland both during and after the communist regime, and Cole does a superior job of demonstrating how environmental protection rhetoric in a Marxist-Socialist state rang hollow for so many years.

REVIEW

One of the most effective tools that Professor Cole uses to dramatize the extent of the environmental crisis in Poland is the vignette. Chapter One, Poland's Ecological Crisis, is rife with these, and they are employed creatively to illustrate the underlying point that they support. For instance, to bring home the horrific nature of the air quality in the Krakow region, Cole describes the

2. DANIEL H. COLE, *INSTITUTING ENVIRONMENTAL PROTECTION: FROM RED TO GREEN IN POLAND* 3 (1998).

torrential acid rain that literally melts away the stone city: "The rain in and around Kraków was so acidic that it corroded railway tracks Throughout Kraków, centuries-old statues lost their faces; steeples fell off churches; and, by 1989, 'the view down every street [was] disrupted by the scaffolding of workers trying to hold the buildings together.'"³ This chapter goes on to isolate and discuss in greater detail the four main sources of pollution in Poland: industry, mining, poor sewage, and agricultural chemical run-off.

Chapter Two, A History of Environmental Law in Poland, starts by tracing the evolution of environmental law and policy from pre-Communist Poland, through Communist Poland, to post-Communist Poland. While legislative efforts prior to World War II were made to protect certain sectors of the environment, these were largely ignored after the Communist take-over, and not much happened until 1980, when the Environmental Protection and Development Act ("1980 EPDA") was passed by the Sejm, Poland's parliament.

Designed with the twin, seemingly incongruent, aims of environmental protection and exploitation of natural resources, "[t]he 1980 EPDA was a comprehensive statute designed to deal with the whole panoply of environmental media and their problems."⁴ Cole explains that the main promise of the broadly applicable 1980 EPDA was the imposition of an affirmative duty on Communist Poland's central planners to give "due consideration" to environmental protection. However, this promise was left unfulfilled because, in practical use, the 1980 EPDA requirements were reduced to procedural niceties that did not require action beyond this "due consideration," and imposed no mandates whatsoever.⁵

The remainder of Chapter Two is dedicated to a generalized description of the media-specific provisions of the 1980 EPDA, its Title III duties and liabilities, and its Titles V and VII administrative fees and penalties. Cole also discusses Poland's nascent steps toward public participation, the environmental movement and structural administrative changes in environmental protection during the mid to late 1980s. Overall, the first two chapters lay out the background and provide the basis for the succinct, understandable, and very detailed discussion of environmental protection in Communist Poland that follows. Cole makes good use of this springboard to launch into Chapter Three's topic: The 'Enforceability' of Poland's Environmental Laws.

Before proceeding into the theoretical thicket of legal enforceability, the author wisely takes time to nurse definitional considerations in order to build an analytical framework for this issue:

Enforceability analysis asks whether a law *could* be enforced to achieve its objectives, whereas enforcement analysis concerns whether the law is actually being enforced to achieve its objectives. On my definition,

3. *Id.* at 17 (quoting Lloyd Timberlake, *Poland—The Most Polluted Country in the World?*, 92 NEW SCIENTIST 249 (1981)).

4. *Id.* at 43.

5. *See id.* at 60.

a law that *is* perfectly unenforceable is incapable of actual enforcement. A law that is perfectly enforceable still may not actually be enforced for political or economic reasons extraneous to the legal text.⁶

From this premise, Professor Cole proceeds to explain that 'enforceability' is reliant entirely on "what is written into the laws; it is internal to the laws themselves."⁷ Consequently, a law that does not create binding obligations is unenforceable; however, one that does is enforceable. Ambiguity of legislative language is another factor. In the context of Communist Poland, the 1980 EPDA was considered enforceable, even though it was left largely unenforced.⁸

Nonetheless, one interesting provision of the 1980 EPDA was the innovative step of providing legal recourse for citizens against polluters. Structurally, this was done under Poland's Civil Code, wherein legally recognized citizen organizations were allowed to sue in civil court to enjoin activities that threatened the environment. By 1985 six such organizations were listed on the Ministry of Justice's roster of groups authorized to bring suit. However, attempts to avail themselves of this provision were rare because of a variety of political and economic factors.⁹ Like many aspects of environmental law and policy in Communist Poland that Professor Cole describes, this heartening provision proved illusory in practice.

Moreover, a string of overwhelming exceptions that functioned to "swallow the rule" of environmental protection, contributed to the 1980 EPDA's unenforcement. For example, weak financial incentives undercut environmental regulations. Cole notes that "Poland's environmental laws and regulations frequently combined stringent legal standards with relatively weak economic standards (fees) and penalties (fines)."¹⁰ To draw a reverse analogy, we see this problem literally redefined as a goal, relentlessly pursued by conservative politicians here in the United States, with the objective of protecting their industrial and business financial backing by pushing for less stringent pollution standards and fines. However, Cole does not impute any malicious intent on the part of the communist government that ruled Poland until 1989, as I have just done with American lawmakers. In fact, he notes that this problem was most likely unintentional, and a result of the "socialist economic system's inability to price goods and resources accurately."¹¹

The second zone of causative elements explaining environmental failure in Poland is the subject of Chapter Four, Enforcement Problems I: Party Politics.

This is an informed description of the oppressive one-party socialist state's effect on environmental protection in Communist Poland. Here, Cole delves into the four chief institutional obstacles to effective environmental protection found

6. *Id.* at 62 (emphasis in original).

7. *Id.*

8. *See id.* at 67.

9. *See id.* at 77.

10. *Id.* at 85.

11. *Id.*

in any socialist polity: (1) the incongruent friction between environmental law enforcement and legitimizing principles of party rule, such as full employment and industrial production; (2) unbalanced power structures within the party hierarchy, such as industrial/economic ministries over environmental agencies; (3) flaws in the judicial and prosecutorial system, such as unfettered prosecutorial discretion and incompetent environmental investigators; and finally (4) the tight control of environmental information typically found in a totalitarian regime.¹²

Particularly intriguing were Cole's narratives in this chapter. One illustrates the political primacy that industrial production interests took over environmental protection interests (§ 4.3), where financial penalties for excessive pollution were routinely avoided by the exercise of raw power on the part of the industrial ministries. Another narrative focuses on the blatant politicization of the judicial and prosecutorial systems (§4.4), where

[a] prosecutor could suspend any criminal suit or investigation, on his own initiative or on the recommendation of Party superiors, simply by deciding that the activity causing the environmental violation was of overriding importance to the national economy. This constituted a final decision terminating all proceedings, usually even before formal charges were filed. The 'higher necessity' ruling was not subject to judicial review, and it did not have to be published.¹³

The third grouping of reasons for Poland's environmental desecration is contained in Chapter Five, Enforcement Problems II: Socialist Economics. Here, Cole introduces the structure of the socialist economic system, highlighting basic assumptions, such as the abolition of private property rights and the assertion of state/party control over most property as well as the means of production. Then he moves into a detailed explanation of how central economic planning worked. Essentially the operative economic theory was as follows: "Under [state control] of the means of production, central planning was not only a feasible alternative to the market but a more efficient choice. State planners were supposed to provide better-informed economic decision-making than the anarchic marketplace in which millions of independent agents made individualized decisions"¹⁴

In reality, socialist economies were not more efficient than capitalist ones; they were more inefficient in almost every respect due to a variety of reasons.¹⁵ This inherent flaw was exacerbated by the fateful decision of the Soviet Bloc countries to undergo rapid industrialization, plundering their natural resources and processing them in "a rather wasteful way to produce poor quality products using methods of production which appear to have been significantly more

12. *Id.* at 88.

13. *Id.* at 103.

14. *Id.* at 115.

15. *See id.* (expounding upon the reasons socialist economics were inefficient).

capital- and labour-intensive than need be.”¹⁶

Moreover, because Poland's investment in environmental protection, as a percentage of gross national product, was far lower than its sister Soviet-style states (0.43% from 1981-1985, as opposed to 1.0% for Romania, 1.1% for Hungary and Bulgaria and 1.2% for the USSR), not to mention the western democracies (1.8% for the U.S., 1.9% for West Germany and Sweden and 1.6% for France), Poland suffered worse effects of environmental degradation than the rest.¹⁷ However, perhaps most importantly, Cole points out that the structural features of Poland's socialist economy actually prevented it from shifting over to intensive modes of production as opposed to extensive ones.¹⁸ Flexible capitalist economies had made this shift naturally; however, the extensivity problem for inflexible, centrally planned socialist economies was one that could not be overcome. The result was that the socialist economies over time grew more wasteful (less intensive), and by the 1980s had to invest more than three times the input to achieve the same output as the capitalist economies.¹⁹ The unavoidable consequences were dramatically increased pollution and greater waste of natural resources. Compounding these difficulties was the consistent failure of an economy based on Marxist principles to value resource scarcity.²⁰

A central tenet of Marxist philosophy is that only labor has value; labor is what adds value to any commodity. Therefore, natural resources, in their natural state, had no inherent value, and were thus offered up for production without any costs incurred. Under this theory, exploitation proceeded unchecked in pursuit of the socialist goals of full employment and full production. One point that Professor Cole failed to explore here is how Poland's exploitation compares to natural resource exploitation in the United States, where historically and even today, government controlled grazing rights on plains areas, timber rights in national forests, etc. are sold off to private interests for exploitation consistently far below market price.²¹

Beyond pricing mechanisms, Cole goes on to explain how regulatory conflicts of interest can play a significant role in continued environmental degradation in socialist economies where the state/party is both the regulator and the regulatee (owner of the polluting source). Here, he does draw an analogy to the United States and the dichotomy we have experienced with respect to nuclear energy:

16. *Id.* at 121 (quoting Włodzimierz Brus, *The Implications of Modern Technology for Socialism: Comments on Michael Harrington's Paper*, in *THE SOCIALIST IDEA: A REAPPRAISAL* 183 (L. Kołakowski & S. Hampshire, eds. 1974)).

17. *See id.* at 130.

18. *Id.* at 153.

19. *See id.* at 137.

20. *See id.* at 140-41.

21. *See generally* Simon H. Ginsberg, *Economic and Environmental Challenges to Natural Resource Trade*, 10 EMORY INT'L L. REV. 297 (1996); Todd M. Olinger, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 U. COLO. L. REV. 633 (1998).

Private nuclear plants in the USA are subject to stringent regulation by the independent Nuclear Regulatory Commission (NRC). By contrast, publicly owned nuclear facilities, managed by the Department of Energy (DOE), are largely exempt from NRC licensing and enforcement. The DOE has often been accused of withholding information, falsifying documents and underreporting threats. For example, when the US government's Hanford nuclear reservation emitted 340,000 curies of radiation into the air above Washington and Oregon between 1944 and 1947, tens of thousands of exposed residents were never warned. They did not even learn of their exposure until 40 years later; the first public disclosure came in 1986 By contrast, the 1979 accident at the privately owned Three Mile Island (TMI) nuclear power plant in Pennsylvania was attended by massive media coverage, which led to a public outcry about nuclear safety, federal investigation of the accident and new nuclear safety regulations.²²

Cole uses this example to draw the conclusion that "the U.S. government has policed private nuclear power far better than its own nuclear facilities."²³ However, while the point is well-taken, I would note that between 1944 and 1979, much has changed by way of media monitoring of government action as well as citizen willingness to protest government action, or inaction as the case may be; not to mention the likelihood that regulations have evolved dramatically.

Again, this chapter ends with a blanket absolution for the moral culpability of the Polish communist government's failure to achieve environmental protection. Good faith pursuit of socialist economic objectives inevitably and unfortunately lead to an appalling level of environmental degradation. But, Cole explains that it was the structure of the socialist economy that lead to this downfall, and the obstacles raised to block environmental protection "were not intended or designed to obstruct environmental protection, but that was their effect."²⁴

This is the most dense chapter in Cole's book, perhaps necessarily so, because economics is a subject not given to easy explanation, and is one that requires many numbers, charts and statistics to back up its assertions—all of which Cole supplies in abundance here. To his credit, the author has not permitted the heavy material in this chapter to bog down the reader, but rather has struck a good balance between sophisticated analysis and abbreviated explanation.

The final chapter of the four dealing with the elements that wrought such environmental woes in Poland, is Chapter Six, The Ideological Dimension: Marxism and the Environment. Here, Professor Cole goes to great lengths to draw connections between Marxism as a coherent philosophy, as applied by Lenin and the Soviets, and the resultant environmental consequences. He does

22. COLE, *supra* note 2, at 149.

23. *Id.*

24. *Id.* at 153.

so both creatively and convincingly. In fact, I would predict that this will be the most often cited portion of his book, as it clearly offers the most versatile transferability to other works because it goes beyond strictly the Polish experience.

In this chapter, Cole dissects, in depth, the writings of Marx and Engels to spotlight the flawed assumption that environmental problems would simply vanish under the socialist state as an extension of Marx's labor value theory.²⁵ He relies on dramatic and persuasive illustrations, like the destruction of the Aral Sea from over-irrigation ordered by short-sighted central planners,²⁶ and even offers a brief look into eco-socialism as a newly enlightened transformation of Marxist philosophy.²⁷ But Cole's most effective point is the correlation between common ownership and common interest:

In theory, social ownership means that everyone owns and is responsible for preserving resources; but in practice it has meant that no one owns or is responsible for anything. More than 2,000 years ago, Aristotle wrote 'that which is common to the greatest number has the least care bestowed upon it.' Today this observation is known as the 'tragedy of the commons.'²⁸

From there, Cole launches into a soliloquy on Garrett Hardin's famous 1968 work on the ultimate fate of common property—over-exploitation in the name of self-interest.²⁹

Chapter Six is well argued and tightly reasoned. It lays the foundation for socialist-Marxist philosophy, concentrating on the intersection of this philosophy with environmental concerns and the disastrous consequences that followed. I believe, however, that this chapter would have been better placed at the beginning of the four "explanatory" chapters. Such re-positioning would have allowed for greater assumptions, especially regarding Chapter Four on Party Politics and Chapter Five on Socialist Economics. Consequently, I would recommend that the reader digest Chapter Six before Chapters Four and Five for a clearer perspective of the whole. That said, the information in these middle chapters is well assembled and invaluable for an understanding of what went wrong in Communist Poland to cause the environmental problems Poles now face.

The final two chapters wrap up the over-arching analysis, and offer some insight into Poland's current environmental course and where it may go. Chapter Seven, Environmental Protection in Transition, provides the reader with a thumbnail sketch of how environmental protection has evolved in Poland from roughly 1990 to 1995. After a succinct description of the "shock therapy"

25. *Id.* at 167.

26. *Id.* at 161-62.

27. *Id.* at 179-81.

28. *Id.* at 162 (quoting ARISTOTLE, *Politica*, in *THE BASIC WORKS OF ARISTOTLE* 1113, 1148 (Bk. II: ch. 3) (R. McKeon, ed. & Benjamin Jowett, trans., 1941)).

29. *Id.* at 162-63.

economic reforms adopted by the newly democratic Polish government and designed to institute a modern welfare state, surpassing a *laissez-faire* economy,³⁰ Professor Cole starts to debunk the misconceptions surrounding this transitional phase, such as that inflation and unemployment were inherited from the old system when they were really converted from a hidden factor into an open one.³¹ Perhaps most striking are the numbers and charts Cole uses to demonstrate that while the economy grew, emissions and pollution dropped.³²

Structurally, Poland's Administration changed as well. In 1989, the new government created a Ministry of Environmental Protection, Natural Resources and Forestry that quickly developed a National Environmental Policy establishing short-term, mid-term and long-term goals.³³ Moreover, an Environmental Law Reform Task Force was convened to draft new legislation.³⁴ This body, however, decided that the most efficient road to travel was to amend the existing 1980 EPDA and not promulgate new law. Subsequently, the EPDA has been amended seven times rather than replaced, and despite criticisms about piecemeal legislation, its enforcement appears to be having a positive impact.

Nevertheless, one stumbling block over which the new government fell was privatization of state/party operated industries. As Cole admits

privatization of Poland's mammoth, pollution-belching state enterprises has proceeded at a snail's pace, plagued by financial scandals and political/ideological debates over the state's proper role in the economy. As of December 1994, only thirty-six percent of the more than 8,000 state-owned enterprises in Poland had been privatized³⁵

When the slow privatization process began, the government had no policy to cover environmental issues, and in fact only addressed such concerns when, and if, they were raised by potential western buyers.

To deal with this problem, the Privatization Ministry and the Environmental Protection Ministry created an Interministerial Environment Unit in 1992 to develop policies for resolving environmental issues that arise in the context of privatization.³⁶ Thus far, the impact is considered positive. However, if such foresight had been brought to bear at the beginning of the process, perhaps many more problems could have been resolved expeditiously. Cole offers an

30. See *id.* at 187.

31. *Id.* at 188-89.

32. *Id.* at 208.

33. The short-term goal (3-4 years) was to eliminate imminent threats to human health; the mid-term goal (3-10 years) was to "reverse declining environmental trends by ratcheting-up Polish environmental standards to western levels;" and the long term goal (25-30 years) was to implement sustainable development policies throughout the economy. See *id.* at 195.

34. See *id.*

35. *Id.* at 202 (citing UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, POLAND: ECONOMIC RESTRUCTURING AND DONOR ASSISTANCE 46-59 (1995)).

36. See *id.* at 203.

unnecessary apology for the Polish government on this score, noting that "there was no pre-existing blueprint for Poland's political-economic transformation," and that "[w]e should not be surprised or overly dismayed by the Polish government's failure to foresee every issue, no matter how significant."³⁷ While I understand his point, I cannot help but think that, were I a Pole, it would be fairly easy for me to deduce that the greatest source of pollution making my life miserable was coming from the large state/party controlled industries, and that cleaning them up should be part of the process of selling them off. If this was not done, I would indeed be "overly dismayed."

The rest of the chapter is dedicated to charting the increase in environmental investments, technological innovations, and international assistance in Poland. Cole also takes a politically intriguing look into the birth, fragmentation, and continued evolution of Poland's non-governmental organizations in the environmental movement. However, one of the author's most interesting points is one of the last. Cole correctly identifies potential European Union ("E.U.") membership as a prime motivator for Poland instituting environmental protection post haste. Part of acceding to the E.U. is harmonizing one's laws with those of the E.U.; and the E.U. has fairly stringent environmental protection standards. It will be fascinating to see, and I hope that Professor Cole offers a subsequent article on this, whether there is a broad disparity in five years between the progress in Eastern Europe on environmental protection in aspiring E.U. member states such as Poland, Hungary and the Czech Republic, and those who will not soon be members such as Bulgaria, Romania and the Ukraine.

Finally, in Chapter Eight, Institutional Implications, Cole rounds out the book with a plate-full of suggestions that he offers as prescriptions to help alleviate some of Poland's chronic environmental pains. These include resolution of the conflict of interest problem raised in Chapter Five by "(1) privatizing polluters and resource users, (2) decentralizing environmental law enforcement powers, and (3) disseminating environmental information among government agencies, non-governmental organizations and the public at large."³⁸ Other well-considered recommendations include negating the effects of Marx's labor value theory through realistic valuation of scarce resources and engendering/nurturing the "rule of law" as a universal concept, so that law actually trumps political machinations.³⁹ I believe Cole's solutions will probably prove effective.

In an effort to put the nail in the coffin of Marxist-socialist thought environmentally, Cole anticipates and then poses a series of unanswerable questions to newly emergent neo-Marxist socialists and eco-socialists. His questions range from "[H]ow might socialist property institutions and central planning be structured to avoid (in practice as well as in theory) the regulatory conflicts of interest that hampered environmental protection efforts in previously existing socialist states?"⁴⁰ to "[I]n the absence of competitive markets, how

37. *Id.*

38. *Id.* at 227.

39. *See id.* at 241.

40. *Id.* at 249.

might future socialist societies spur technological innovations for environmental protection?"⁴¹

On a supplemental note, one area that this book does not explore, except to touch on the issue,⁴² is the text and effectiveness of environmental provisions in the Poland Constitution itself. Constitutional investiture of environmental protection provisions has been an interesting phenomenon to observe in Eastern Europe, and I would recommend the 1997 article by Ryan Gravelle in the *Virginia Environmental Law Journal*⁴³ as additional reading alongside Professor Cole's otherwise very complete and well put-together book. Moreover, I would turn the reader to an article by Mark Kristiansen in the *Administrative Law Review*⁴⁴ for further reading on environmental protection and the privatization process in Poland.

CONCLUSION

While Daniel Cole's book is, overall, an excellent treatment of environmental law in Poland, it is perhaps a book whose time has not yet come. The historical analysis of environmental law and policy in Communist Poland that Cole offers paints a very complete picture, both in breadth and depth. His thoroughness is to be applauded. Moreover, his description of the current climate in Poland on environmental issues is also quite detailed, and, to the best of my judgment, very accurate. However, publication of this seminal work only eight years out from the collapse of the communist state and the rise of democratic Poland, leaves Professor Cole in the unenviable position of predicting the path that Poland is likely to follow along the lines of environmental law. Therefore, the subtitle of this book "From Red to Green in Poland," is considerably weighted more toward an analysis of the "red" than the "green." This is a function of the fact that there is simply more material available from a Communist Poland that lasted for forty-five years than a newly emergent non-Communist Poland, that has only existed for eight.

The laws that have been passed are largely untested, and environmental policy in Poland clearly has a way to go before it begins to gel. In fact, no clear consensus has yet emerged about the ultimate shape of environmental policy in this newly democratic country. Arguably, this book would have been able to offer a more complete comparison and analysis ten to twelve years along in the political/social/legal evolutionary cycle than it could possibly hope to accomplish at this early date. So, perhaps a different nomenclature for the book's subtitle would have solved this problem, one basically of expectation. That said, I would note that any collection of works on environmental law in East European states

41. *Id.*

42. *Id.* at 41-42, 213.

43. Ryan K. Gravelle, *Enforcing Environmental Rights in East European Constitutions*, 16 VA. ENVTL. L.J. 633 (1997).

44. Mark Kristiansen, *Incorporating Environmental Law in the Context of Privatization Transactions in Hungary, Poland, and Russia*, 48 ADMIN. L. REV. 627 (1996).

would be incomplete without Professor Cole's book among them. It is the culmination of seven years' hard labor, as evidenced by the detailed anecdotes, analogies and factual descriptions that can only come from such a focused effort as Cole has put into this book.

Moreover, as an environmental attorney, but a layman in the area of Polish environmental law, history and policy, I was able to understand the dilemma, and appreciate the situation faced by the democratic Polish government. This was due solely to Professor Cole's foresight, experience, and ability to present his facts, arguments and analysis in a logical, cogent and coherent fashion, without proceeding to unending notations *ad nauseam* as many ill-advised academics are want to do.

In short, this book is highly readable, and Professor Cole has acquitted himself exceedingly well in this, his first venture as a book author. I am confident that this highly respectable work, together with the work that Daniel Cole has already done in the field, will help place this newly-tenured Indiana University professor in the growing pantheon of international environmental law scholars that includes Edith Brown Weiss of Georgetown, Sir Geoffrey Palmer of Victoria, David Wirth of Washington & Lee, Jutta Brunnée of British Columbia, David Favre of Michigan State and Lakshman Guruswamy of Tulsa.

NOTES

COURT-APPOINTED EXPERT PANELS: A COMPARISON OF TWO MODELS

KAREN BUTLER REISINGER*

INTRODUCTION

Science and the law make uneasy partners. Expert testimony at trial in toxic tort and product liability cases is unavoidable and increasingly complex.¹ This creates two sources of difficulty for a federal trial judge: (1) how to manage the potential venality and questionable science presented by some experts selected by the parties;² and (2) how to understand the scientific issues well enough to make admissibility decisions under the judge's role as "gatekeeper" of expert testimony.³

To address either issue, courts sometimes turn to court-appointed experts pursuant to Federal Rule of Evidence 706 ("Rule 706").⁴ In the first instance, a neutral expert appointed by the court may provide a reference point for a jury trying to determine the scientific truth based on biased testimony from party experts.⁵ Without the neutral expert, it is feared, juries cannot make just and

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1. See JOE S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 3 (1993), *microformed on Sup. Docs. No. JU 13.2:C 83/4* (U.S. Gov't Printing Office) [hereinafter CECIL & WILLGING STUDY].

2. See *id.* at 13; see also FED. R. EVID. 706 advisory committee's note.

3. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (stating the role of the judge in determining the admissibility of scientific evidence is a "gatekeeper"). The Court in *Daubert* held Federal Rule of Evidence 702 ("Rule 702") sets the standard for admission of scientific testimony by an expert. *Id.* at 587. Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

4. See CECIL & WILLGING STUDY, *supra* note 1, at 3-5. In contrast to Rule 702, which guides a judge in qualifying expert witnesses, Rule 706 allows a judge to appoint an expert witness to testify at trial. FED. R. EVID. 706.

5. See *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1583, 1589 (1995) [hereinafter *Developments in the Law*].

consistent determinations.⁶ In the second instance, a court-appointed expert may assist the judge in determining whether the methodology behind a proffered opinion is based on scientifically valid principles.⁷ Judges know the law but need help wading through the scientific principles involved in complex litigation such as toxic torts. A court-appointed expert could help teach the court enough for sound decision-making during the admissibility phase of the pretrial process.⁸

Some complex issues, however, need more than one expert. For example, causation in toxic torts is a particularly difficult area.⁹ There can be three types of problems: (1) whether the substance has the capacity to cause the disease suffered by the plaintiff;¹⁰ (2) whether the particular plaintiff contracted the disease because of exposure to the agent and not for another reason existing in the general population;¹¹ and (3) whether the particular defendant being sued produced the agent causing the plaintiff's disease.¹² Determination of the capacity of a substance to cause the disease suffered by the plaintiffs (sometimes called "general causation")¹³ often involves complex interaction of scientific disciplines including toxicology, epidemiology, and other branches of medicine.¹⁴ To understand this interaction, more than one expert must help the jury or the judge make an appropriate assessment of the science involved.

Court-appointed expert panels raise uncertainty for litigants that they will receive fair treatment from juries. Aspects of the adversarial system such as party autonomy and impartial decision-making¹⁵ are compromised when court-appointed expert panels testify at trial. Parties want to control the presentation of the testimony to a jury to ensure fairness.¹⁶ Juries, as impartial decision-makers, bring social conscience into the litigation process.¹⁷ Courts have been

6. See *id.* at 1585-86, 1589 (discussing the errors in decision-making by juries without accurate evidence and suggesting court-appointed experts could alleviate this problem).

7. See CECIL & WILLGING STUDY, *supra* note 1, at 12.

8. See, e.g., Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 795-96 (1994) (suggesting court-appointed experts as a method for applying the *Daubert* test); Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995 (1994) (advocating increased use of court-appointed experts).

9. See Jean Macchiaroli Eggen, *Toxic Torts, Causation, and Scientific Evidence After Daubert*, 55 U. PITT. L. REV. 889, 890 (1994).

10. See *id.*

11. See *id.*

12. See *id.* at 903.

13. See *id.* at 896.

14. See *id.* at 896-98.

15. See Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 300 (1995) (setting out party autonomy and impartial decision-making as key aspects of the adversarial system).

16. See *id.* at 300-02.

17. See Allan Kanner, *The Evolving Jurisprudence of Toxic Torts: The Prognosis for Corporations*, 12 CARDOZO L. REV. 1265, 1279-80 (1991) (discussing the importance of the jury

reluctant in the past to appoint expert panels to testify at trial out of respect for the adversarial system.¹⁸ However, the judge's increased managerial role and his role as gatekeeper of expert testimony likely will increase the need for court-appointed expert panels in toxic tort cases.¹⁹ Two recent appointments of expert panels provide models for the judiciary in addressing this need.²⁰

Specifically, in May 1996, U.S. District Chief Judge Sam C. Pointer, Jr. appointed a national expert panel, pursuant to Rule 706, to investigate the causation data in the combined federal cases regarding silicone gel breast implants.²¹ Requested by the National Plaintiff's Steering Committee,²² Judge Pointer's order provides for an expert panel to review scientific data relevant to the issues in the breast implant litigation, particularly general causation.²³ The panel will serve as experts for any trial under the multidistrict litigation umbrella.²⁴ However, following an initial "discovery-type," casual deposition taken by the parties, an individual expert's testimony is limited to a video-taped deposition presided over by Judge Pointer.²⁵ Parties will participate in the videotaped deposition by cross-examining each expert about his findings.²⁶

in "doing justice" in toxic tort cases because it brings morals and values into the analysis that a scientific expert would not).

18. See CECIL & WILLGING STUDY, *supra* note 1, at 20. Most panels appointed to date either assisted the court in understanding the issues or assisted the court in determining appropriate reorganization plans. Compare, e.g., *Pierce v. Murphy*, 984 F.2d 196 (7th Cir. 1993) (court-appointed expert panel recommended new procedures for children services department to reach settlement agreement); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979) (panel of court-appointed experts assisted special master in evaluating a desegregation plan for Cleveland and Ohio); *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980) (panel of experts appointed by the court to evaluate prison system medical care), with *In re Swine Flu Immunization Prods. Liab. Litig.*, 495 F. Supp. 1185 (W.D. Okla. 1980) (panel of experts appointed to testify in Swine Flu suits). See also THOMAS E. WILLGING, COURT-APPOINTED EXPERTS, 18 & n.62 (1986).

19. See Cecil & Willging, *supra* note 8, at 995-96; Stephan Landsman, *Of Witches, Madmen, and Products Liability: An Historical Survey of the Use of Expert Testimony*, 13 BEHAV. SCI. & L. 131, 154-55 (1995).

20. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Order 31 (N.D. Ala. 1996), 4 MEALEY'S LITIG. REP.: BREAST IMPLANTS, June 13, 1996, at F-1 [hereinafter Order 31]; *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392 (D. Or. 1996).

21. Order 31, *supra* note 20, at F-1.

22. *Id.* The National Plaintiff's Steering Committee is a group of individuals appointed by the court to coordinate litigation efforts on behalf of all plaintiffs participating in the multidistrict litigation.

23. *Id.* at F-4. Judge Pointer made subsequent modifications to his original order. See MEALEY'S LITIG. REPS.: BREAST IMPLANTS, May 1996-Nov. 1996. The most significant of the modifications further defined the parameters for the working of the National Science Panel. See *infra* notes 205-07, 211 and accompanying text.

24. Order 31, *supra* note 20, at F-1.

25. *Id.* at F-5.

26. *Id.*

By contrast, in December 1996, U.S. District Judge Robert E. Jones filed an opinion and order describing a Federal Rule of Evidence 104(a) ("Rule 104(a)") admissibility hearing²⁷ in which he employed four court-appointed experts to act as his advisors.²⁸ Judge Jones appointed the experts using the inherent power of the court.²⁹ The parties' experts presented their evidence and answered questions from the court, the panel of appointed advisors, and the parties themselves.³⁰ Each advisor submitted a report, and the parties raised questions about the reports before Judge Jones issued his ruling.³¹

The processes of appointing experts pursuant to Rule 706 and under the inherent authority of the court raise questions of party autonomy and fairness that judges need to consider before following either model. This Note ascertains which court-appointed panel model is more appropriate for the adversarial system. Part I reviews the history of court-appointed experts in our system. Part II discusses modern justifications for and opposition to court-appointed experts. Part III focuses on expert panels appointed by the court: reviewing arguments for their use during and before trial; looking in detail at the two models provided by judges in the breast implant litigation; and comparing the models in the context of the adversarial process. This Note recommends that judges looking to utilize court-appointed expert panels use a preliminary hearing model because it represents the best balance of scientific certainty, party autonomy, and impartial decision-making.

I. HISTORY OF COURT-APPOINTED EXPERTS

Noted partisanship on the part of doctors testifying at trial during the 1850s prompted calls for reform of expert testimony.³² Proposals for reform continued through the early 1900s.³³ Judges responded to proposals by appointing their own experts using the inherent authority of the court.³⁴ These early court-

27. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392 (D. Or. 1996). *See also* FED. R. EVID. 104(a).

Preliminary questions concerning the qualification of a person to be a witness, the existence of privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, [the court] is not bound by the rules of evidence except with respect to privileges.

Id.

28. *Hall*, 947 F. Supp. at 1392-93.

29. *Id.* at 1392.

30. *Id.* at 1393.

31. *Id.* at 1394.

32. *See* Landsman, *supra* note 19, at 144-47.

33. *See id.* at 151 (citing Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908)).

34. *See, e.g., Ex parte Peterson*, 253 U.S. 300, 312 (1920) (discussing the history of court-appointed advisors).

appointed experts generally had the special skills necessary to assist the judge in narrowing issues, interpreting complex financial data or auditing volumes of data.³⁵ Experts utilized in this manner preserved the litigants' Seventh Amendment³⁶ right to a trial by jury because their appointment only made the judicial process more efficient by simplifying issues without making ultimate fact determinations.³⁷ In addition, some experts could participate in preliminary hearings to assist the judge in sorting evidence for presentation at trial.³⁸ A judge might also enter an expert's report into evidence, provided the parties had an opportunity to call rebuttal witnesses.³⁹ Courts likened court-appointed experts to special masters, used at the time only in suits in equity.⁴⁰ The early cases laid out broad authority for the trial judge to appoint and utilize an expert to make preliminary findings, however, left the "ultimate determination of issues of fact"⁴¹ for the jury.

Courts continued utilizing the inherent power of the court to appoint various specialists to assist the judge before or during trial.⁴² However, one judge in 1962 expressed concern over the potential for abuse of the inherent power.⁴³ In particular, he wanted to protect the parties from the surprise appointment of an expert and he wanted to ensure the expert chosen had no hidden bias.⁴⁴ Even with this judge's expressed concern and the enactment of the Federal Rules of Evidence in 1975,⁴⁵ courts still enjoyed broad discretion to appoint advisors or experts.⁴⁶ For example, the appellate court in *Reilly v. United States*⁴⁷ found the

35. See *id.* at 313.

36. U.S. CONST. amend. VII. The Seventh Amendment states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Id.

37. See *Ex parte Peterson*, 253 U.S. at 309-10.

38. See *id.* at 310.

39. See *id.* at 311.

40. See *id.* at 312-14.

41. *Id.* at 310.

42. See *Danville Tobacco Ass'n v. Bryant-Buckner Assocs., Inc.*, 333 F.2d 202 (4th Cir. 1964); *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962). See also *Cecil & Willging*, *supra* note 8, at 1001-04 (discussing recent uses of experts appointed to assist the judge at trial and pretrial).

43. *Scott*, 298 F.2d at 932 (Hincks, J., dissenting in part).

44. *Id.*

45. The enactment of the Federal Rules of Evidence in 1975 included express authority for the court to appoint experts. See FED. R. EVID. 706.

46. See, e.g., *Reilly v. United States*, 863 F.2d 149, 157 (1st Cir. 1988) (holding the district court properly invoked the court's inherent power to hire a technical advisor to assist the judge in making estimates of damage award in a medical malpractice case).

47. 863 F.2d 149 (1st Cir. 1988).

district court's appointment of a technical advisor proper even though the judge gave no notice to the parties.⁴⁸ However, that court was quick to point out the impropriety of such action if the expert had been appointed by the court to *testify* at trial.⁴⁹ The *Reilly* court attributed this finding to the difference between technical advisors and experts who will testify at trial.⁵⁰ Technical advisors, appointed with the inherent power of the court, present no evidence at trial.⁵¹ By contrast, an expert appointed by the judge under Rule 706 presents evidence at trial and is subject to deposition and cross-examination by the parties.⁵² The *Reilly* court apparently decided that a court's discretion to appoint expert advisors is broader than that under Rule 706. A closer look at Rule 706 will highlight some procedural safeguards that restrict a judge's inherent power⁵³ and outline some other purposes fostered by the Rule.

Federal Rule of Evidence 706 gives the court authority, upon its own motion or the motion of a party, to appoint an expert witness.⁵⁴ To an extent, this rule

48. *Id.* at 155-56.

49. *Id.* at 156.

50. *Id.* at 155-56.

51. *Id.* at 156.

52. *Id.* at 155-56. *See also* FED. R. EVID. 706(a).

53. *See Reilly*, 863 F.2d at 156 (stating Rule 706 establishes a procedural framework for court-appointed expert witnesses); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 706[02] at 706-15 (1988) ("The provisions of subdivision (a) of Rule 706 operate as restrictions on the judge's common law power to appoint experts.") [hereinafter WEINSTEIN'S EVIDENCE].

54. FED. R. EVID. 706(a). Federal Rule of Evidence 706 states:

- (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
- (b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.
- (c) Disclosure of appointment. In the exercise of its discretion, the court may

codified the practice federal courts already followed.⁵⁵ Similar to development of the court-appointed expert process at common law, agreement of the parties on the appointment is recommended, not required.⁵⁶ In addition, the Rule provides no limit on the ability of the parties to call experts on their own.⁵⁷

Rule 706 departs from the common law in significant ways, however. Unlike the traditional practice which allowed the judge to exercise broad discretion in choosing and utilizing a court-appointed expert, Rule 706 imposes procedural checks on the court's inherent power.⁵⁸ These checks include: (1) the expert himself must agree to testify;⁵⁹ (2) the expert witness must inform the parties of his findings;⁶⁰ (3) the parties must be provided an opportunity to both depose and cross-examine the expert witness;⁶¹ (4) the court must delineate the duties of the expert in written form, filing a copy of the document with the court's clerk for access by all parties;⁶² and (5) the court's appointment decision is reviewed on appeal with an abuse of discretion standard.⁶³ The advisory committee's notes suggest Congress codified the inherent power of the federal court;⁶⁴ however, addition of the "safeguards" in Rule 706 reflect an intent to minimize the negative effects of court-appointed experts on the adversarial process. Each safeguard appears to protect the parties' interests in controlling and contributing to the fact-finding process while granting the court access to an impartial expert. Rule 706 also effectively addresses concerns about notification of appointment to the parties by encouraging their participation in the appointment process. The parties' involvement in selection of an expert and the parties' ability to depose and cross-examine the expert address concern about uncovering potential bias of the appointed expert.

Adding procedural safeguards was not the only reason for adopting Rule 706. Abuse of the judicial system by the use of partisan experts⁶⁵ and the need for

authorize disclosure to the jury of the fact that the court appointed the expert witness.

- (d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Id.

55. See FED. R. EVID. 706 advisory committee's note ("The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. . . . Hence the problem becomes largely one of detail.").

56. FED. R. EVID. 706(a); see also WILLGING, *supra* note 18, at 6-7.

57. FED. R. EVID. 706(d).

58. See *supra* note 56.

59. FED. R. EVID. 706(a).

60. *Id.*

61. *Id.*; see also, WEINSTEIN'S EVIDENCE, *supra* note 53, at 706-15.

62. FED. R. EVID. 706(a).

63. WILLGING, *supra* note 18, at 3 (citing *Gates v. United States*, 707 F.2d 1141, 1144 (10th Cir. 1983)).

64. FED. R. EVID. 706 advisory committee's note.

65. See FED. R. EVID. 706 advisory committee's note.

more effective management of the federal court docket⁶⁶ also motivated codification of the common law. Three specific concerns emerged. Availability of experts was the first issue.⁶⁷ Experts avoided involvement with litigation because they distrusted the adversarial process to represent their views in an objective fashion or to expose the scientific truth.⁶⁸ A process allowing for neutral expert testimony alleviated this concern. Rule 706 permits such testimony.

Enactment of Rule 706 also attempted to discourage the practices of "shopping for experts" and venality.⁶⁹ Shopping for experts is a partisan practice whereby parties select an expert based on the conformity of the expert's opinion to that party's theory of the case. This practice, according to commentators, helps obscure the truth rather than reveal it for resolution by the jury.⁷⁰ Enactment of the Rule also sought to decrease "junk science" in the courtroom.⁷¹ "Junk science" is a term developed to describe the type of expert testimony relied upon by some plaintiffs which is purported to lack credible scientific foundation.⁷² According to the advisory committee, in addressing these problems, Rule 706 overtly threatens the appointment of a neutral expert by the

66. See Landsman, *supra* note 19, at 154 (discussing the increased pressure on federal courts to manage litigation because of the rising number of cases being brought in federal court).

67. See FED. R. EVID. 706 advisory committee's note.

68. See Landsman, *supra* note 19, at 144-46.

69. See FED. R. EVID. 706 advisory committee's note. A venal expert is one whose opinion tends to change based, in part, on his fee, or, based on the position of the party that hired him. See *Developments in the Law*, *supra* note 5, at 1586; see also BLACK'S LAW DICTIONARY 1555 (6th ed. 1990) (defining venal: "[P]ertaining to something that is bought; capable of being bought; offered for sale; mercenary. Used usually in an evil sense, such purchase or sale being regarded as corrupt and illegal.").

70. See E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 493 (1989) (commenting "an expert's testimony can be used to obfuscate what would otherwise be a simple case"); Landsman, *supra* note 19, at 148-51 (discussing the effect of expert venality on fact-finding and tracing the development of expert shopping from the mid-nineteenth century to the present). See generally Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113 (outlining the problems with partisan expert testimony and suggesting reforms using court-appointed experts); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833 (1985) (contrasting the German fact-finding process with the American adversarial fact-finding process and recommending the adoption of a system in the United States where the judge plays a more managerial role in the fact-finding process).

71. FED. R. EVID. 706 advisory committee's note.

72. See PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 2 (1991); Ellen Relkin, *Some Implications of Daubert and Its Potential for Misuse: Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts*, 15 CARDOZO L. REV. 2255, 2255 n.3 (1994).

court.⁷³ In theory, it was proposed, "the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge *may* appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services."⁷⁴ In addition, parties usually end up paying for court-appointed experts,⁷⁵ increasing their overall costs. This aspect of the rule supports a theory that parties would rather address venality and unreliable science issues themselves, rather than paying for another expert.⁷⁶

By enacting Rule 706, its developers sought mainly to improve the quality of testimony by party experts, not necessarily to encourage the use of appointed experts at trial. Implied in this theory is a balance of the need for experts to help resolve complex issues of science or technology and the virtues of party autonomy inherent in the adversarial system.⁷⁷ Actual appointment of experts was meant to be rare.⁷⁸

II. MODERN DAY COURT-APPOINTED EXPERTS

A. Justifications

All commentators seem to agree that the need for and the use of scientific testimony in product liability litigation is likely to increase as products become more complex and science advances more rapidly.⁷⁹ This trend coupled with continued concern about "junk science"⁸⁰ and venal experts supports modern day advocacy for increasing the use of court-appointed experts.⁸¹ Further, the

73. See FED. R. EVID. 706 advisory committee's note. See also Pamela Louise Johnston, Comment, *Court-Appointed Scientific Expert Witnesses: Unfettering Expertise*, 2 HIGH TECH. L.J. 249, 261 (1987) (suggesting the advisory committee intended that judges use the threat of appointment inherent in the rule, not the mechanism itself); Michael J. Saks, *The Phantom of the Courthouse*, 35 JURIMETRICS J. 233, 234 (1995) (reviewing CECIL & WILLGING STUDY, *supra* note 1).

74. FED. R. EVID. 706 advisory committee's note.

75. See FED. R. EVID. 706(b) (requiring parties pay for a court-appointed expert).

76. See the interesting discussion on a lawyer's responsibility to select an appropriate expert in Dick Thornburgh, *Junk Science—The Lawyer's Ethical Responsibilities*, 25 FORDHAM URB. L.J. 449 (1988).

77. See Saks, *supra* note 73, at 234.

78. See *id.*

79. See CECIL & WILLGING STUDY *supra* note 1, at 3 (citing JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 97 (1990)).

80. See *supra* notes 71-72 and accompanying text.

81. See *Developments in the Law*, *supra* note 5, at 1589; Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL'Y REV. 480, 484-85 (1988); Beverly W. Lubit, Note, *The Time Has Come for Doing Science: A Call for the Rigorous Application of Daubert Standards for the Admissibility of Expert Evidence in the Impending Silicone Breast Implant Litigation*, 42 N.Y.L. SCH. L. REV. 147

Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁸² making the judge a gatekeeper for expert testimony, provides additional fodder for advocates.⁸³

Partisan experts, commentators argue, often fail to clarify issues for the jury because the expert may tailor testimony to meet the needs of the client rather than make a full disclosure.⁸⁴ Adversarial experts also tend to polarize the parties' theories of the case⁸⁵ and may create a conflict for resolution by a jury where in actuality little conflict exists.⁸⁶ In contrast, a neutral expert is loyal to the court's interest in finding the truth.⁸⁷ The reason is simple: Neutral experts are "less susceptible to pressures to tailor their testimony to support a particular legal outcome than are partisan experts whose fees are paid by parties interested in the legal outcome."⁸⁸ Since the use of a court-appointed expert under Rule 706 is not intended to replace party experts,⁸⁹ but merely to enhance the information available to the trier of fact, the neutral expert may fill in gaps of knowledge necessary for resolution of the parties' dispute.⁹⁰ Hence, advocates of court-appointed experts encourage sacrificing some party autonomy for more accurate results.

A second modern justification for Rule 706 court-appointed experts is encouraging the parties to settle before trial.⁹¹ A court-appointed expert working with the parties and their corresponding experts before trial, may clarify issues on which the party experts agree and disagree.⁹² This reduces polarization⁹³ and forces the lawyers to re-evaluate continually their positions.⁹⁴ If the court-appointed expert clarifies issues for the parties, allowing them to resolve the case without a trial, the parties save money and the federal case load is reduced. If the

(1998).

82. 509 U.S. 579, 597 (1993) (discussing the gatekeeping role of the judge in allowing expert testimony).

83. See Black et al., *supra* note 8, at 793-94; Cecil & Willging, *supra* note 8, at 995-96; Lubit, *supra* note 81, at 147.

84. See Gross, *supra* note 70, at 1188; *Developments in the Law*, *supra* note 5, at 1589-91.

85. See Gross, *supra* note 70, at 1181.

86. See *id.* at 1184.

87. See Langbein, *supra* note 70, at 847; Lee, *supra* note 81, at 492-93.

88. Lee, *supra* note 81, at 493. See also Gross, *supra* note 70, at 1188 (commenting: "If witnesses are chosen and compensated by the court, and responsible to it, these pitfalls are avoided.").

89. See FED. R. EVID. 706(d).

90. See Lee, *supra* note 81, at 493.

91. See CECIL & WILLGING STUDY, *supra* note 1, at 15; WEINSTEIN'S EVIDENCE, *supra* note 53, at 706-09.

92. See CECIL & WILLGING STUDY, *supra* note 1, at 16.

93. See *supra* note 86 and accompanying text.

94. See CECIL & WILLGING STUDY, *supra* note 1, at 16. See also Langbein, *supra* note 70, at 832-38 (discussing the fact-finding process in the German system that encourages settlement through the use of expert witnesses).

court-appointed expert simply narrows issues for trial, the trial process itself becomes more efficient. The growing federal case load adds weight to this argument since slim judicial resources force federal courts to look for ways to increase efficiency.⁹⁵

Advocates of Rule 706 argue that court-appointed experts could assist the judge in determining the reliability and fit of an expert's testimony in his gatekeeping role under Federal Rule of Evidence 702 ("Rule 702").⁹⁶ In *Daubert*⁹⁷ the Supreme Court articulated the requirement under Rule 702 of "a preliminary assessment of whether the reasoning or methodology underlying the testimony [of an expert witness] is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."⁹⁸ This "gatekeeping role"⁹⁹ of the judge puts him in the difficult position of having to assess the scientific validity of a scientist's assumptions, methodology, and data. Without the necessary scientific skills, a judge thrust into this role may need an appointed expert to help him make sound decisions on admissibility.¹⁰⁰

B. Opposition to Court-Appointed Experts

If court-appointed experts were a panacea, judges would likely use the Rule 706 process more often, particularly in toxic tort and product liability cases. This is far from reality. Of 431 federal district judges polled for a 1993 study, only twenty percent had appointed an expert under Rule 706;¹⁰¹ only ten percent had used the process more than once.¹⁰² Some of the reasons cited for the rare appointment of Rule 706 experts include the infrequency of the need for

95. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 317-18 (1985). See generally THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994).

96. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). Federal Rule of Evidence 702 provides for the use of expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. See also Black et al., *supra* note 8, at 790-96; CECIL & WILLGING STUDY, *supra* note 1, at 12; Margaret G. Farrell, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: Epistemology and Legal Process*, 15 CARDOZO L. REV. 2183, 2202 (1994).

97. 509 U.S. 579 (1993).

98. *Id.* at 592-93.

99. *Id.* at 597.

100. See Cecil & Willging, *supra* note 8, at 995-96 (noting the Supreme Court itself recognized the possibility judges would need experts to assist them in their gatekeeping capacity); see also Black et al., *supra* note 8, at 790-96 (expressing faith in judges to make correct admissibility decisions with help from court-appointed advisors, experts or special masters); Lubit, *supra* note 81, at 148-50 (suggesting judges employ more court-appointed experts to "independently evaluate" scientific evidence).

101. See CECIL & WILLGING STUDY, *supra* note 1, at 7.

102. See *id.* at 8.

appointed experts,¹⁰³ particularly in light of judicial respect for the adversarial system,¹⁰⁴ and the failure to recognize the need for such an expert until the eve of trial when delay is costly.¹⁰⁵

Scholars offer additional reasons for caution in using appointed experts under Rule 706. One argues "by designating [an expert] witness as court-appointed and 'impartial' the court has in effect cloaked him with a robe of infallibility."¹⁰⁶ The concern is undue persuasion. A designation of impartiality may elevate the appointed expert's status, persuading the jury to the expert's viewpoint regardless of the validity of the parties' position on the same issue. Opponents of appointed experts argue that the opportunity to cross-examine the appointed witness cannot safeguard against a jury's perception that the court-appointed expert is infallible.¹⁰⁷

Closely related to this concern is the additional weight a jury may give to the court-appointed expert's testimony. When the court announces the expert is "neutral" a jury likely will believe that opinion. The problem is twofold. First, a "neutral" expert may not always be right.¹⁰⁸ Second, a "neutral" expert may be biased by the school of thought under which he trained.¹⁰⁹ If a jury follows the "neutral" opinion, the court-appointed expert has interfered with the deliberative process of the jury.¹¹⁰

Data regarding the impact of a court-appointed expert on a jury is mixed. Little empirical data exists on the subject,¹¹¹ and what little there is points to a finding that jurors do not accord nonadversarial experts more weight.¹¹² The actual experience of federal judges, however, indicates real juries do seem to follow court-appointed expert opinions. For example, in a study of court-appointed experts in a series of asbestos litigation, the court-appointed expert witnesses had a noticeable effect on jury outcomes.¹¹³ A court-appointed expert testified in each of sixteen asbestos injury cases tried in the Southern District of

103. See *id.* at 18.

104. See *id.* at 20.

105. See *id.* at 22.

106. Elwood S. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416, 424 (1961). See also Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 41 (1991), discussed *infra* notes 114-20.

107. See Levy, *supra* note 106, at 427.

108. See *id.* at 420.

109. See *id.* at 421; Relkin, *supra* note 72, at 2257.

110. See Levy, *supra* note 106, at 424; Relkin, *supra* note 72, at 2257; see also Kian v. Mirro Aluminum Co., 88 F.R.D. 351, 356 (E.D. Mich. 1980). But see Gross, *supra* note 70, at 1194, 1197 (arguing neutrality of the court-appointed expert *should* influence the jury).

111. See Black et al., *supra* note 8, at 787 n.456; Gross, *supra* note 70, at 1183 n.215.

112. See Nancy J. Brekke et al., *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial versus Adversarial Expert Testimony*, 15 LAW & HUM. BEHAV. 451, 451 (1991) (reporting that "jurors did not accord more weight to nonadversarial expert testimony").

113. See Rubin & Ringenbach, *supra* note 106, at 41.

Ohio.¹¹⁴ Since some of the experts needed to testify by videotaped depositions, practicality forced the judge to advise the jury of an expert's court appointment in each of the trials.¹¹⁵ Juries hearing the cases received instructions to "not attach any significance to that fact in considering [the appointed expert's] testimony."¹¹⁶ In cases involving asbestosis, "the jury decided with the [c]ourt's expert in thirteen out of sixteen cases."¹¹⁷ In case involving pleural plaque, "the juries decided with the [c]ourt's expert in twelve out of sixteen cases."¹¹⁸ The judge in the cases, Judge Carl B. Rubin, and his assistant, Special Master Laura Ringenbach, concluded: "A court's expert will be a persuasive witness and will have a significant effect upon a jury."¹¹⁹ Other judges polled about similar experiences agree with this conclusion.¹²⁰

Litigants on both sides of the table dislike Rule 706 court-appointed experts because the process interferes with party autonomy.¹²¹ In essence, lawyers argue against court-appointed experts because lawyers lose the ability to control development of expert witness testimony because coaching of the court-appointed expert is not allowed.¹²² Discomfort with court-managed expert testimony under Rule 706 is not surprising, however, given the liberal procedural rules that govern most aspects of federal litigation. Some commentators suggest the greater managerial role of the federal judge in settlement proceedings and other pre-trial processes in recent years may encourage the use of court-appointed experts.¹²³ However, this trend only would reduce party autonomy further.

For litigants, another disadvantage of court-appointed experts is higher litigation costs. The parties pay for a court-appointed expert's time¹²⁴ and must make additional preparations¹²⁵ to accommodate the extra witness. More experts

114. See *id.* at 39. The original number of plaintiffs was sixty-five; however, forty-two "were found to be free of any condition giving rise to a cause of action." *Id.*

115. See *id.* at 40.

116. *Id.* at 46.

117. *Id.* at 41.

118. *Id.* "[T]here is overlap in the foregoing [cases] since only sixteen cases in toto [were] involved but [with] two questions [in] each." *Id.*

119. *Id.*

120. See CECIL & WILLGING STUDY, *supra* note 1, at 52-56.

121. See WILLGING, *supra* note 18, at 22-23; see also Gross, *supra* note 70, at 1193.

122. See Gross, *supra* note 70, at 1200.

123. See Landsman, *supra* note 19, at 154-55; Langbein, *supra* note 70, at 858-66 (theorizing the continued rise in managerial aspects of a federal judge's role will increase the use of court-appointed experts; however, safeguards against abuse of judicial power must develop concurrently).

124. See FED. R. EVID. 706(b) (providing for compensation of court-appointed experts).

125. Extra preparation could include researching the background of the court-appointed expert to prepare cross-examination, deposing the court-appointed expert, or further physical or psychological examination of a party. See Relkin, *supra* note 72, at 2266-267 (identifying additional physical examinations of a party as one extra cost in product liability cases where the health of a party or causation is at issue). See generally CECIL & WILLGING STUDY, *supra* note 1, at 57-65.

at trial increases court costs as well. Thus, any use of court-appointed experts adds to an individual party's costs.

Finally, judges sometimes forego the Rule 706 appointment process because identifying an expert with appropriate qualifications and neutrality is difficult and time consuming.¹²⁶ Although no systematic method for procuring names of potentially suitable experts exists, several options have been proposed including centralized expert resource centers,¹²⁷ government agency expert review panels,¹²⁸ and professional association referrals.¹²⁹ Scientists themselves encourage the participation of professional associations in providing neutral experts.¹³⁰ Given that some scientists dislike the litigation process because some lawyers encourage venality,¹³¹ and that the Federal Judicial Center encourages judges to utilize professional associations to help find neutral experts,¹³² interaction through associations is likely to develop first. Any formalized collaborative effort likely will develop slowly.

III. COURT-APPOINTED EXPERT PANELS

A single court-appointed expert witness may have minimal negative effect on the outcome of an individual case.¹³³ However, in toxic tort and some product liability cases, finding a single expert who could address every scientific issue in the case is a daunting (if not impossible) task.¹³⁴ The complexity of cases such as toxic torts, and concern over venal experts and "junk science" experts offered by some parties,¹³⁵ led scholars to conclude that court-appointed expert panels under Federal Rule of Evidence 706 offer viable solutions. Suggestions to use court-appointed expert panels sometimes include overhauls of the judicial

126. See CECIL & WILLGING STUDY, *supra* note 1, at 21-22.

127. See CARNEGIE COMM'N ON SCIENCE, TECH., AND GOV'T, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES 17 (1993) [hereinafter CARNEGIE COMM'N REPORT].

128. See Lawrence S. Pinsky, Comment, *The Use of Scientific Peer Review and Colloquia to Assist Judges in the Admissibility Gatekeeping Mandated by Daubert*, 34 HOUS. L. REV. 527, 529 (1997).

129. See Gross, *supra* note 70, at 1214-15.

130. See, e.g., MARCIA ANGELL, M.D., SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE 205-07 (1996); James T. Rosenbaum, *Lessons From Litigation Over Silicone Breast Implants: A Call for Activism By Scientists*, 276 SCI. 1524 (1997).

131. See Gross, *supra* note 70, at 1115.

132. See MANUAL FOR COMPLEX LITIGATION SECOND § 21.51 (1985).

133. See *supra* notes 111-20 and accompanying text.

134. See MARGARET A. BERGER, PROCEDURAL AND EVIDENTIARY MECHANISMS FOR DEALING WITH EXPERTS IN TOXIC TORT LITIGATION: A CRITIQUE AND PROPOSAL 40-41 (Carnegie Commission on Science, Technology, and Government 1991). See generally CECIL & WILLGING STUDY, *supra* note 1, at 31-34.

135. See, e.g., ANGELL, *supra* note 130, at 207; Gross, *supra* note 70, at 1220.

system¹³⁶ or eradication of the jury altogether in complex cases.¹³⁷ Some scholars argue that changing the system in which the expert panels operate effectively eliminates the conflicts a court-appointed panel would have with the adversarial system and the jury process. Thus, party autonomy within the jury process is sacrificed on the altar of scientific certainty. Such sacrifice is unnecessary. Existing procedural rules, the integrity of the judiciary, and modern managerial techniques can effectively utilize the knowledge of court-appointed expert panels preserving both the adversarial process and the right to a jury trial.¹³⁸ The remainder of this Note explores briefly the use of court-appointed expert panels as witnesses and as advisors, then compares two current expert panel models.

A. Using Court-Appointed Expert Panels

Some proponents of the increased use of Rule 706 court-appointed experts argue that juries may not understand the complexity of scientific issues. Proponents argue that a panel of court-appointed experts should make findings of fact.¹³⁹ Few empirical studies address the adequacy of juries in making decisions based on the probabilistic proof offered by many scientists in complex

136. See, e.g., Gross, *supra* note 70, at 1221-29 (proposing procedural changes with incentives for judges and lawyers to use court-appointed experts in every case); Langbein, *supra* note 70, at 825 (advocating more judicial control over the fact-finding process similar to the German approach); Pinsky, *supra* note 128, at 529 (suggesting a centralized panel of experts provide colloquia review of data offered by party experts).

137. See, e.g., *In re United States Fin. Secs. Litig.*, 609 F.2d 411, 429-32 (9th Cir. 1979); Ora Fred Harris, Jr., *Complex Product Design Litigation: A Need for More Capable Fact-Finders*, 79 KY. L.J. 477, 508 (1991) (determining an expert jury is the most feasible method to eliminate the confusion of complex product design cases while furthering efficiency and equity); William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 950-51 (1981) (advocating the use of an administrative body for complex civil litigation similar to other Congressionally created agency tribunals); *Developments in the Law*, *supra* note 5, at 1605 (concluding alternative methods of dispute resolution best handle complex or scientific issues).

138. The absolute right to a jury trial in civil cases is disputed in the literature; however, this paper assumes that in tort litigation, regardless of complexity, litigants retain the Seventh Amendment right to a jury trial. See *Ex parte Peterson*, 253 U.S. 300, 309-10 (1920) (stating the need under the Seventh Amendment to ensure the jury function is not usurped by court-appointed experts); Luneburg & Nordenberg, *supra* note 137, at 1004 (concluding after analyzing the Supreme Court's opinion in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977), that state common law claims would not fit the *Atlas* criteria for exclusion from the Seventh Amendment right to a jury trial).

139. See, e.g., Harris, *supra* note 137, at 508 (advocating the use of an expert jury); Luneburg & Nordenberg, *supra*, note 137, at 950-51 (advocating the use of an administrative body for complex civil litigation similar to other Congressionally created agency tribunals); Pinsky, *supra* note 128, at 529 (suggesting "external scientific peer review of proffered evidence" and/or using "colloquium style preliminary hearings" to educate the judge in making admissibility decisions).

toxic tort cases.¹⁴⁰ However, results of some cases and studies support the increased use of appointed expert panels to render scientifically oriented fact determinations.¹⁴¹ In the adversarial system, the best use of expert panels would not replace the jury. An expert panel is best used to assist the judge in evaluating the foundation of scientific testimony. Such an idea is not far-fetched, particularly in light of recent applications of expert panels in the silicone breast implant cases.¹⁴² The key to any use of court-appointed expert panels is the proper balance of justice, fairness, efficiency and adherence to the traditional values of the adversarial system.

1. *Court-Appointed Panels at Trial.*—Introducing a Rule 706 expert panel to testify at trial¹⁴³ may cause excessive interference with the adversarial system. Concern stems from two difficulties: parties usually control presentation of evidence to the jury,¹⁴⁴ and juries usually deliberate evidence not weighted by a court-appointed panel of experts.¹⁴⁵

Procedural issues of how to present the panel experts' testimony perhaps loom largest. First, Rule 706 suggests either the court or one of the parties may call an appointed witness to testify.¹⁴⁶ If the panel expert's testimony is favorable to a particular party, it makes sense for that party to call the expert witness, allowing the other party to cross-examine. The panel testimony then integrates into a party's presentation of evidence. That party's position is weighted not

140. See Black et al., *supra* note 8, at 787 n.456; Gross, *supra* note 70, at 1183 n.215.

141. Professor Samuel R. Gross provides a clear example of a court reaching a non-scientific resolution in a case based on partisan expert testimony. Tried to a judge, the court found a spermicide caused birth defects without scientifically credible evidence. Gross, *supra* note 70, at 1121-24 (discussing *Wells v. Ortho Pharmaceutical Corp.*, 615 F. Supp. 262 (N.D. Ga. 1985), *aff'd as to liability, modified as to damages* 788 F.2d 741 (11th Cir. 1986)). Professor Gross asserts juries likely would be no better than judges in similar circumstances. *Id.* at 1180. See also Jane Goodman, *Jurors' Comprehension and Assessment of Probabilistic Evidence*, 16 AM. J. TRIAL ADVOC. 361, 375 (1992) (concluding jurors "failed to make adequately refined distinctions between probabilities" in a mock study of jury reaction to probabilistic evidence).

142. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996); Order 31, *supra* note 20, at F-1.

143. Rule 706 itself suggests experts appointed with this authority will testify at trial stating, "the witness may be called to testify by the court or any party." FED. R. EVID. 706(a). Some courts use Rule 706 to appoint experts even if the experts will not testify at trial. See WILLGING, *supra* note 18, at 18-23 (describing the various uses for court-appointed experts).

144. See Gross, *supra* note 70, at 1193 (discussing main arguments against court-appointed experts); see also Langbein, *supra* note 70, at 840-42 (discussing the use of court-appointed experts in the American system and the adversarial approach to presenting testimony); Longan, *supra* note 15, at 300-01 (suggesting the key elements of the adversarial process are party autonomy and impartial juries).

145. See Relkin, *supra* note 72, at 2257.

146. FED. R. EVID. 706(a).

only by the testimony of its own experts¹⁴⁷ but by the court-appointed panel as well. A party faced with such opposition may feel compelled to even the score by providing additional experts. Thus, this scenario encourages proliferation of marginally useful testimony and works against the purpose of Rule 706 to control venal experts.

When neither party wants to call the panel experts and the court must, timing of the testimony becomes an issue. When in the trial process is presentation of the panel testimony least prejudicial? One commentator suggests the most neutral timing is between presentation of the two parties' cases.¹⁴⁸ Whatever timing the judge selects is likely to influence the jury in some manner because of a fact inherent to a panel of experts—there is more than one expert. Both parties will attempt to discredit the appointed experts' testimony. As a result, a jury will likely conclude something is different about that set of witnesses. The panel testimony in such a situation may unduly influence the deliberations of the jury¹⁴⁹ regardless of the judge's decision to divulge the panel's court-appointed status.¹⁵⁰

In addition, assuming the court has each panel expert testify separately, too many experts testifying at trial may confuse the jury. Statistical data or probabilistic proof of complex concepts is difficult for juries to handle.¹⁵¹ More information from additional experts may compound confusion. Some data suggest jurors exhibit a propensity to not listen well with one court-appointed expert.¹⁵² The likelihood of jurors tuning out testimony of successive court-appointed panel members seems high. Neither litigants nor the judge want a confused jury, ignoring all of the relevant scientific testimony because too much is presented.¹⁵³

147. Rule 706 states, "Nothing in this rule limits the parties in calling expert witnesses of their own selection." FED. R. EVID. 706(d). Expert witness testimony is limited by other rules of evidence including Rules 702, 703, 705, 401, 402, and 403. *See generally* FED. R. EVID.

148. WILLGING, *supra* note 18, at 12.

149. *See* Longan, *supra* note 15, at 300-01 (discussing the importance of an impartial decision-maker on the appearance of fairness in judicial administration). *See also* Rubin & Ringenbach, *supra* note 106, at 41.

150. Scholars disagree over the propriety of divulging the court-appointed status of any expert. *Compare* Brekke et al., *supra* note 112, at 470 (advising against informing juries of experts' court-appointed status) *with* Gross, *supra* note 70, at 1194, 1197 (implying an expert's court-appointed status should be divulged in order to increase his influence with the jury).

151. *See* Goodman, *supra* note 141, at 375; Harris, *supra* note 137, at 491 (suggesting that juries are unable to comprehend technology involved with products liability design defects).

152. Brekke et al., *supra* note 112, at 470. Brekke's mock jury study reports, "recognition recall of the expert testimony was significantly higher in adversarial conditions than in nonadversarial conditions." *Id.* Therefore, even if court-appointed experts present more impartial and accurate testimony than party experts, the jury may not notice because they seemingly pay less attention to the court-appointed experts. *Id.*

153. The appellate process may be a safeguard for confusion because of too much expert testimony. In one case, the appellate court held a trial court did not abuse its discretion to appoint

Improving the integrity of scientific evidence presented in complex toxic tort cases is important. Party autonomy and impartial fact finding likely will suffer if court-appointed panels present findings in addition to party testimony. An expert panel appointed by the judge for pretrial hearings is likely a better solution to problems of questionable science and venal experts within the adversarial system.

2. *Court-Appointed Panels Before Trial.*—No doubt concerns expressed by commentators, judges, and rulemakers about expert venality and experts offering “junk science” is justified.¹⁵⁴ These arguments reflect skepticism about a jury’s ability to wade through the “junk” and glean the truth.¹⁵⁵ In cases such as toxic torts, it makes sense to use a pretrial process that ensures the efficacy of scientific testimony and minimizes the “junk.” Courts can achieve a high level of efficacy using expert panels in conjunction with the judge’s *Daubert*¹⁵⁶ gatekeeping role. In fact, many commentators recognize the value of court-appointed experts in the *Daubert* process.¹⁵⁷ Few, however, recommend that a judge utilize his inherent authority to appoint an advisory panel.¹⁵⁸

A court reduces the opportunity for “junk science” to invade the courtroom by undertaking a panel inquiry at an early juncture,¹⁵⁹ respecting party autonomy in the process. Judge Robert E. Jones in Oregon effectively utilized a process similar to the one briefly described here.¹⁶⁰ First, the judge called for a pretrial admissibility hearing as part of his managerial role under Federal Rule of Civil

an expert under Rule 706 when “additional experts would . . . add more divergence and opinion differences.” *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 334 (Ct. Cl. 1980).

154. If this were not the case, no one would write about it and Rule 706 would not exist. Venality is a concern because it tends to polarize parties, increase costs and adversely effect jury decision-making. See Gross, *supra* note 70, at 1129-36; Lee, *supra* note 81, at 482-83. “Junk science” is of concern in toxic torts because of issues related to causation which can involve complex scientific data sets. See Eggen, *supra* note 9, at 893.

155. See, e.g., *Developments in the Law*, *supra* note 5, at 1586-87 (arguing partisan expert testimony on complex and scientific issues makes fact finding extremely difficult); Harris, *supra* note 137, at 491 (arguing some complex cases fall outside a lay person’s understanding which effects his or her ability to sort out complex facts from partisan experts). Some commentators blame lawyers for this phenomenon. Elliott, *supra* note 70, at 492-93; Gross, *supra* note 70, at 1129-30.

156. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)

157. See, e.g., Black et al., *supra* note 8, at 793-96; Cecil & Willging, *supra* note 8, at 995-97; Gross, *supra* note 70, at 1187-88; Lee, *supra* note 81, at 480; Lubit, *supra* note 81, at 147.

158. See Black et al., *supra* note 8, at 796. One commentator suggests the differences between appointed experts under the inherent authority and under Rule 706 differ only in the function they serve. WILLGING, *supra* note 18, at 22.

159. Federal Rule of Evidence 706 was implemented partly to evade “junk science.” FED. R. EVID. 706 advisory committee’s note. See also *supra* note 74 and accompanying text.

160. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392-94 (D. Or. 1996).

Procedure 16.¹⁶¹ Using the court's inherent power, the judge appointed an expert panel.¹⁶² The parties' experts presented testimony, in a direct and cross-examination format for the panel and the judge.¹⁶³ Panel experts submitted findings on specific questions posed by the judge, and parties challenged the panel experts' findings.¹⁶⁴ Next, applying the standard of Rule 702¹⁶⁵ and the corresponding Supreme Court guidelines in *Daubert*¹⁶⁶ (including Federal Rule of Evidence 104(a)),¹⁶⁷ the judge ruled on whether the underlying methodology of a particular party expert was admissible, unreliable, invalid, or irrelevant.¹⁶⁸

In a process like the one Judge Jones employed, if proffered expert testimony is determined admissible, the judge has ensured the evidence will assist the jurors in making factual determinations.¹⁶⁹ Most importantly, the parties retain control over presenting the evidence to a jury. Neither the jury's knowledge of the panel's existence nor the possibility of the panel being outcome determinative become an issue at trial. Thus, two elements that help maintain the integrity of the adversarial process remain intact: Party autonomy and impartial decision-makers.¹⁷⁰

Some commentators suggest using a panel procedure similar to the one discussed here.¹⁷¹ However, they advocate using a centralized clearinghouse and

161. This rule sets out lists of subjects for consideration during pretrial conferences. FED. R. CIV. P. 16(c). These include disposition of pending motions, the need for adopting special procedures for handling complex issues, and any other matters effectuating a just, speedy and inexpensive disposition of the action. *Id.* A judge might order an admissibility hearing under any of these provisions, or upon motion in limine by one of the parties. *See, e.g., Hall*, 947 F. Supp. at 1391. *See also* FED. R. CIV. P. 26(a)(2) (providing for disclosure of the identity and potential content of expert witnesses' testimony to the other parties with management by the court).

162. *Hall*, 947 F. Supp. at 1392. *See also* *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930 (2d Cir. 1962) (using a similar process).

163. *Hall*, 947 F. Supp. at 1392-93.

164. *Id.* at 1393-94.

165. Federal Rule of Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702 (emphasis added).

166. In *Daubert*, the Court set out a two step analysis for admissibility of scientific evidence under Rule 702. "[T]he reasoning or methodology underlying the testimony [must be] scientifically valid and . . . [the] reasoning or methodology [must] be appli[cable] to the facts in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

167. Federal Rule of Evidence 104(a) provides for the trial judge to make preliminary findings concerning the admissibility of evidence, without being bound by the Rules of Evidence in making the ruling. FED. R. EVID. 104(a).

168. *Daubert*, 509 U.S. at 590-92.

169. *See* FED. R. EVID. 702.

170. *See* Longan, *supra*, note 15, at 300.

171. *See* CARNEGIE COMM'N REPORT, *supra* note 127, at 16; Pinsky, *supra* note 128, at 553.

group of experts for appointment by courts.¹⁷² This seems time-consuming and expensive. It is certainly more costly than judges appointing panels when necessary, with direct help from universities or scientific associations,¹⁷³ and requiring payment by the parties.¹⁷⁴

Appointed expert panels in *Daubert*-style hearings that preserve presentation of expert testimony by the parties at trial is the best way to ensure party autonomy and jury integrity while efficiently resolving toxic tort disputes. Two examples clarify this point.

B. Court-Appointed Expert Panels in Practice

In litigation over silicone gel breast implants, the issue of whether silicone causes systemic disease has prompted much debate.¹⁷⁵ Systemic disease causation is debated partly because existing epidemiologic data show no link to silicone, while plaintiffs' experts argue a new disease is occurring which current epidemiologic studies fail to consider.¹⁷⁶ This presents a classic example of science and the law as uneasy partners. Science in the breast implant cases may be underdeveloped,¹⁷⁷ yet litigants expect an efficient resolution of their legal

172. See CARNEGIE COMM'N REPORT, *supra* note 127, at 17-18 (recommending the creation of federal and state resource centers, scientific community resource centers, a judicial scientific and technology clearinghouse, and a non-governmental/non-judiciary Science and Justice Council for studying and exploring solutions to the science/law interface issues); Pinsky, *supra* note 128, at 563-64 (suggesting a central group to receive requests from judges and facilitate distribution of questionnaires and assignments to scientists in various government agencies to act as court-appointed experts; government funding of research projects would hinge on cooperation of the individual scientists in the program).

173. See Rosenbaum, *supra* note 130, at 1524 (listing the National Institute of Health, universities, the American Association for the Advancement of Science and the National Academy of Sciences as existing resources for providing scientific guidance). *But see* Pinsky, *supra* note 128, at 545-48 (discussing the various scientific groups willing to help judges appoint experts and ultimately rejecting them in favor of centralizing the program in a more structured fashion).

174. Payment by the parties is suggested in Rule 706. FED. R. EVID. 706(b).

175. Compare Marcia Angell, *Do Breast Implants Cause Systemic Disease? Science in the Courtroom*, 330 NEW ENG. J. MED. 1748 (1994) (arguing rational epidemiological studies show no connection between silicone and connective-tissue disease), with Gary Solomon et al., *Breast Implants and Connective-Tissue Diseases*, 331 NEW ENG. J. MED. 1231 (1994) (arguing existing epidemiological studies fail to account for the new type of connective-tissue disorder caused by silicone).

176. See Lubit, *supra* note 81, at 151-54 (discussing the early evidence that silicone may cause connective-tissue disorder); Jack W. Snyder, *Silicone Breast Implants: Can Emerging Medical, Legal, and Scientific Concepts Be Reconciled?*, 18 J. LEGAL MED. 133, 137-138 (1997) (discussing, generally, the alleged risks associated with silicone).

177. See *In re Breast Implant Cases*, 942 F. Supp. 958, 961 (E. and S.D.N.Y. 1996). Judges in this case suggest summary judgment on causation of systemic disease is improper at this time "since scientists are still developing relevant information." *Id.*

dispute.¹⁷⁸ Two judges have confronted this dichotomy by appointing a panel of experts.¹⁷⁹ One judge chose to use court-appointed experts under Rule 706.¹⁸⁰ The other judge exercised his inherent authority to appoint a panel of independent advisors to assist him in ruling on the admission of expert evidence offered by the plaintiff.¹⁸¹ Although the circumstances of the cases differ slightly,¹⁸² the use of expert panels on the same issue highlights the advantages and disadvantages of court-appointed experts.

1. *National Panel Model.*—Toxic tort litigation differs from traditional product liability in substantial ways. Usually there is a combination of the following factors: a large number of exposed plaintiffs;¹⁸³ a “long latency period between time of exposure and manifestation of the disease;”¹⁸⁴ a disease which “mimic[s] diseases found in background levels in the general population;”¹⁸⁵ and scientific uncertainty of the effects of toxic exposure on people.¹⁸⁶ Litigation of this complexity, for a single toxic substance and in multiple federal districts, may lead to consolidation of pretrial proceedings.¹⁸⁷ Employment of 28 U.S.C. § 1407¹⁸⁸ allows for centralization of the pretrial phase of civil actions under a single judge¹⁸⁹ for convenience and efficiency reasons.¹⁹⁰ This judicial management technique is called “multidistrict” litigation.¹⁹¹

A panel of judges from various districts administer the multidistrict litigation

178. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

179. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996) (using an appointed panel of experts under the court’s inherent authority to assist the judge in making admissibility determinations of expert evidence under Rule 702); Order 31, *supra* note 20, at F-1 (forming a national panel of experts to evaluate plaintiff’s evidence on the causal relationship between silicone and systemic disease).

180. Chief Judge Sam C. Pointer, Jr. of the Northern District of Alabama. Order 31, *supra* note 20, at F-1.

181. Judge Robert E. Jones, District Judge in Oregon. *Hall*, 947 F. Supp. at 1392.

182. Judge Pointer is the transferee judge for silicone breast implant litigation under an order from the Judicial Panel on Multidistrict Litigation. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1101 (J.P.M.L. 1992). Judge Jones was assigned his breast implant case on remand from Judge Pointer. *Hall*, 947 F. Supp. at 1392.

183. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965 (1993).

184. Eggen, *supra* note 9, at 890.

185. *Id.*

186. See *id.* at 896; see also Ann Taylor, Comment, *Public Health Funds: The Next Step in the Evolution of Tort Law*, 21 B.C. ENVTL. AFF. L. REV. 753, 758 (1994).

187. See 15 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3861, at 499-500 (2d ed. 1986).

188. 28 U.S.C. § 1407 (1994).

189. *Id.*

190. See 15 WRIGHT ET AL., *supra* note 187, § 3861, at 499-500.

191. *Id.* at 499.

process.¹⁹² The panel “determine[s] whether transfer is appropriate in a particular case and what district should be denominated the transferee forum.”¹⁹³ Criteria for pretrial consolidation include: the existence of one or more common questions of fact; the convenience of consolidated proceedings for the parties and witnesses; and the promotion of just and efficient conduct.¹⁹⁴ Authority of the transferee judge under § 1407 is limited to proceedings before trial.¹⁹⁵ This puts all discovery motions, motions to amend pleadings, motions to dismiss for lack of jurisdiction or lack of venue, motions to proceed as a class action, and motions for summary judgment occurring during the coordinated pretrial proceedings within the transferee court’s power.¹⁹⁶ Upon consent of the parties or by stipulation, the transferee judge may retain a case or cases for trial.¹⁹⁷ In the circumstances of the silicone gel breast implant cases, the Judicial Panel for Multidistrict Litigation (“JPML”) received overwhelming support for consolidation and appointed Chief Judge Sam C. Pointer of the Northern District of Alabama to handle the pretrial proceedings.¹⁹⁸ Judge Pointer is handling pretrial proceedings for over 21,000 cases from 92 federal districts in the consolidated proceedings.¹⁹⁹

In May 1996,²⁰⁰ upon request by the National Plaintiff’s Steering Committee of the Silicone Gel Breast Implant Products Liability Litigation²⁰¹ (“Consolidated

192. See *id.* at 500.

193. *Id.*

194. See 28 U.S.C. § 1407(a) (1994). The remainder of the statute sets out procedural aspects of the consolidation process and sets limitations on the authority of the Judicial Panel for Multidistrict Litigation (“JPML”). *Id.* § 1407(b)-(h).

195. See 15 WRIGHT ET AL., *supra* note 187, § 3866, at 606.

196. *Id.* at 606-18. Arguably, the transferee judge may rule on motions for summary judgment when discovery is complete without remanding the cases as § 1407 suggests. See *id.* at 618. This makes sense from a judicial economy standpoint given the case overload in the federal courts. See Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588, 602 (1972) for more on this issue.

197. See 15 WRIGHT ET AL., *supra* note 187, § 3866, at 618-19.

198. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1099-1100 (J.P.M.L. 1992). Selection of the transferee forum and judge was the most contentious issue of the transfer process and the JPML decided against using any forum suggested by the parties to preserve the perception of fair and just proceedings. *Id.* at 1100-01. The JPML selected Judge Pointer because of his experience with multidistrict litigation as a past member of the Panel, his participation as a transferee judge in prior litigation, and his familiarity with procedural rules. *Id.* at 1101.

199. Order 31, *supra* note 20, at F-1 n.2. On May 30, 1996, when Judge Pointer issued the order, over 300 cases had already been remanded for trial to 45 district courts. *Id.*

200. A subsequent order issued in October 1996 further delineated the task for the expert panel. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Order 31E (N.D. Ala. 1996), 5 MEALEY’S LITIG. REP.: BREAST IMPLANTS, Nov. 7, 1996, at C-1 [hereinafter Order 31E].

201. The litigation referred to here and throughout this section is the action transferred to Judge Pointer by the JPML in *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926,

Implant Litigation”), Judge Pointer issued an order calling for the development of a National Science Panel (“National Panel”) under Rule 706.²⁰² National Panel members include an expert from each of four scientific disciplines (epidemiology, immunology, rheumatology, and toxicology)²⁰³ and a panel chairman with expertise in “the interrelationship between forensic sciences and legal procedures and processes.”²⁰⁴ The panel’s primary function is the assessment of “[t]o what extent, if any—and with what limitations and caveats—do existing studies, research and reported observations provide a reliable and reasonable scientific basis for one to conclude that silicone-gel breast implants cause or exacerbate”²⁰⁵ certain diseases. Diseases for study include “‘classic’ connective tissue diseases, . . . ‘atypical’ presentations of connective tissue diseases or symptoms[, and] immune system dysfunctions.”²⁰⁶ Each panel member must also assess to what extent opinions contrary to his own “would likely be viewed by others in the field as representing legitimate and responsible disagreement within [his] profession.”²⁰⁷ Judge Pointer gave the experts control over whether to decline review of certain research because of insufficiency or ongoing studies.²⁰⁸

Judge Pointer scheduled a series of hearings for plaintiffs’ and defense’s experts to present findings on the causation issue.²⁰⁹ Attorneys for each party could not ask questions; however, the judge or the appointed panel experts could interrupt presentations as necessary.²¹⁰ After reviewing the available data and consulting with the other experts on the panel, if necessary, each court-appointed expert will submit a written report of his findings particular to his area of expertise.²¹¹ Judge Pointer retained control over issuing panel member reports

793 F. Supp. 1098 (J.P.M.L. 1992).

202. Order 31, *supra* note 20, at F-1.

203. *Id.* at F-4.

204. *Id.*

205. Order 31E, *supra* note 200, at C-1.

206. *Id.*

207. *Id.*

208. Order 31, *supra* note 20, at F-5.

209. See MDL Update: *Pointer’s Scientific Panel to Convene*, 5 No. 8 MED. LEGAL ASPECTS BREAST IMPLANTS 1, 6-7 (July 1997).

210. See *id.* Two presentation hearings were held in 1997: one in July, the other in November. 6 No. 2 MEALEY’S LITIG. REP.: BREAST IMPLANTS 15 (Nov. 20, 1997). *Id.* Judge Pointer may schedule an additional hearing. *Id.* However, one reporter suggests the panel will conclude and submit findings in fall 1998. Carole K. Cones, *Galileo’s Example Recalled: Sound Science is Finally Prevailing in Silicone Breast Implant Controversy*, LAS VEGAS REV.-J., Sept. 27, 1998, at 1D.

211. Order 31, *supra* note 20, at F-4 to F-5. Further specific guidelines for “consultation among [the experts,] procedures for the panel to present questions to the parties and/or to hear presentations from the parties at a future point,” and procedures for panelists to obtain further information from specific report authors were decided during a conference with the experts and the parties. Order 31E, *supra* note 200, at C-1.

to the parties by requesting that preliminary findings be submitted to him directly for determination of whether an expert's findings "have sufficient probative value to justify"²¹² a formal report for the parties.²¹³

Following the deposition requirements in Rule 706,²¹⁴ Judge Pointer's order sets out opportunities for the parties to conduct "'discovery-type' non-videotaped deposition[s] of [an] expert" once the expert has submitted a report.²¹⁵ The judge suggests the parties make this process informal,²¹⁶ most likely because of the more formal aspects of Judge Pointer's plan for trial testimony. According to Rule 706, either party may call a court-appointed expert as a witness, and both parties may cross-examine.²¹⁷ Because Judge Pointer plans to make the panel experts' testimony available for use by any trial court on remand,²¹⁸ "trial testimony . . . will be perpetuated by means of a videotaped deposition at which [the c]ourt . . . will preside. It is further anticipated that [the c]ourt . . . may conduct the initial direct examination of such expert, with the plaintiffs and defendants then being allowed to cross-examine the expert."²¹⁹ Other than the informal deposition by the parties for preparation discussed above,²²⁰ this is the only testimony each court-appointed expert will give.²²¹ Further, any judge on remand may edit the deposition as necessary to conform with his own ruling on disclosure of the experts' court-appointed status to a jury.²²²

Judge Pointer's order, establishing the National Panel, exhibits attention to the consistency and efficiency goals of the multidistrict litigation process and awareness of the party autonomy considerations of Rule 706. Consistency is served by creating a single panel to address the complicated scientific issues involved in systemic disease causation rather than each trial court appointing its own panel.²²³ In addition, allowing for testimony of National Panel members by videotape only ensures consistency in presentation of the expert's opinions in

212. Order 31, *supra* note 20, at F-5.

213. *Id.*

214. "[T]he witness' deposition may be taken by any party." FED. R. EVID. 706(a).

215. Order 31, *supra* note 20, at F-5.

216. *Id.*

217. FED. R. EVID. 706(a).

218. Order 31, *supra* note 20, at F-6.

219. *Id.* at F-5.

220. See *supra* notes 215-16 and accompanying text.

221. Order 31, *supra* note 20, at F-6.

222. *Id.* Subsection (c) of Rule 706 allows the trial court to use its discretion in authorizing disclosure of the court-appointed expert's status to the jury. FED. R. EVID. 706(c). Judge Pointer allowed for each judge on remand to decide if the panel experts' testimony will be used in a *Daubert* hearing or for trial purposes. Order 31, *supra* note 20, at F-6 & n.6.

223. See Order 31, *supra* note 20, at F-1. Judge Pointer refers to the National Plaintiff's Steering Committee's argument in favor of appointing a national panel, "in the interest of avoiding potentially redundant or even conflicting results in potential testimony arising from multiple Rule 706 appointments by different courts, it would be preferable to have a single set of nationally-appointed experts." *Id.*

those courts choosing to use them on remand. Even if the trial judge on remand decides to use the National Panel member's testimony only for *Daubert* hearings,²²⁴ all judges will make rulings from the same data, thereby eliminating any differences in rulings that may occur because of inequities of resources between the parties.²²⁵ The use of a single panel promotes efficiency because each judge on remand need not appoint his own panel. The National Panel's appointment has delayed some cases already remanded.²²⁶ Judge Pointer, however, left to the judge before whom the case is pending any decision to delay trial proceedings.²²⁷

This National Panel model also considers the procedural safeguards built into Rule 706.²²⁸ First, it recognizes the need for adversaries to participate in the development of the panel's objectives and to develop each expert's testimony. The model gives the parties an opportunity to participate in a conference delineating the Panel members' responsibilities and charter.²²⁹ The parties will receive each expert's findings in writing and can informally depose the expert in preparation for the formal videotaped testimony.²³⁰ Cross-examination of the expert witnesses by each of the parties will occur during the formal deposition phase of the hearings.²³¹ Finally, the process envisioned by this model gives the parties, and trial judges on remand, flexibility in determining the best use of the experts' testimony²³² (if at all) for presentation at trial or in conjunction with a Rule 702 and Rule 104(a) *Daubert* admissibility hearing.

The National Panel model is carefully crafted to comply with Rule 706 safeguards and other evidence safeguards.²³³ However, difficulties may arise on

224. See *supra* note 218 and accompanying text.

225. Inequities of resources is an argument used for promoting the use of court-appointed experts, particularly in criminal cases where one party may be indigent. See Lee, *supra* note 81, at 482. The Administrative Office of the United States Courts, the Federal Judicial Center, the National Plaintiff's Steering Committee, and the national defendants will pay for the National Science Panel. See Order 31, *supra* note 20, at F-6; Terence Monmaney, *Scientists Take New Role in Implants Case*, L.A. TIMES, Sept. 15, 1997, at A1. Costs for the individual litigants during trial on remand may also be reduced, since additional depositions or testimony by a Panel expert is restricted by Judge Pointer's order. Order 31, *supra* note 20, at F-5.

226. Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1394-95 (delaying the effective date of the opinion until the National Science Panel had reported).

227. See Order 31, *supra* note 20, at F-6.

228. See *supra* notes 58-63 and accompanying text.

229. Order 31, *supra* note 20, at F-4; see also FED. R. EVID. 706(a).

230. Order 31, *supra* note 20, at F-5.

231. *Id.*

232. *Id.* at F-6.

233. If the panel were required to reach consensus and testify as a group, the probative value of the testimony may outweigh its unfair prejudice to the party not favored. See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.")

remand of individual cases when judges or parties decide to use the National Panel testimony at trial. The manner in which each expert is to give videotaped testimony presents questions about undue weight of the testimony. Although the advisability of telling the jury the status of court-appointed experts is disputed,²³⁴ the method of deposition may bias jurors toward the court's experts. The initial order infers the court will directly examine each expert during his or her deposition,²³⁵ and each party will then cross-examine.²³⁶ Judges on remand may experience difficulty in explaining the participation of another judge²³⁷ and lawyers who are not participants in the case.²³⁸ In fact, the status of the individuals as part of the "National Panel" is likely to give the experts' findings an air of omniscience, artificially weighting the findings. Some opponents of court-appointed experts fear such an uneven result from one such expert;²³⁹ multiple experts may compound the problem. Each remand judge may decide to withhold the experts' status from the jury for this reason. In turn, depending on the nature of the questions asked by the court at deposition and the corresponding cross-examination, jurors may question why the panel experts' testimony seems different. In the asbestos series of cases,²⁴⁰ where a single court-appointed expert testified by videotape, the decision to withhold the expert's status in an attempt to keep all experts on equal footing with uniform introductions "proved impractical."²⁴¹ The question really is whether editing of the videotaped depositions would counter-balance the weight of the appointed panel testimony such that the parties felt their own expert testimony would receive fair treatment. Using the court-appointed panel findings for *Daubert* hearing purposes only would alleviate this concern.

The potential for efficiency and cost savings in pretrial proceedings with a National Panel seem relatively straightforward.²⁴² Some silicone breast implant cases, however, will not proceed with this model until the National Panel

(emphasis added).

234. See *supra* note 151.

235. Order 31, *supra* note 20, at F-5.

236. *Id.*

237. The rules of evidence provide for questioning by the judge; however, in the case of the depositions contemplated here, another judge will do the questioning. See FED. R. EVID. 614. Also, former testimony is admissible under Federal Rule of Evidence 804(b)(1), a hearsay exception as long as the declarant is unavailable. FED. R. EVID. 804(a). The National Panel Model participants will not be available to each litigant for additional questioning according to the original order. Order 31, *supra* note 20, at F-5.

238. The initial order seems to contemplate a representative from each of the plaintiff and defendant groups to question the experts. Order 31, *supra* note 20, at F-3.

239. See Levy, *supra* note 106, at 424; Relkin, *supra* note 72, at 2265.

240. See *supra* notes 113-19 and accompanying text.

241. Ruben & Ringenbach, *supra* note 106, at 40.

242. See *supra* notes 223-27 and accompanying text.

presents results.²⁴³ For example, experts from both parties in *In re Breast Implant Cases*²⁴⁴ had presented testimony in a *Daubert* hearing²⁴⁵ and the two presiding judges determined plaintiff failed to make a “prima facie case”²⁴⁶ on causation of systemic disease by silicone. Instead of finding for the defendant on summary judgment, the court states,

The national Rule 706 committee has, however, not yet reported. It is possible that further information will in time support plaintiffs’ general systemic claims sufficiently to permit a jury trial. A grant of summary judgement and dismissal of plaintiffs’ cases now would be unfair since scientists are still developing relevant information.²⁴⁷

The court in *Hall v. Baxter Healthcare, Corp.*²⁴⁸ made a similar decision to wait for the National Panel results to issue a final ruling.²⁴⁹ In addition, that court held an extensive *Daubert* hearing utilizing a court-appointed expert panel for which the parties paid.²⁵⁰ The judge in *Hall* found plaintiff’s evidence on systemic disease causation lacking, also.²⁵¹ Thus, plaintiffs in these two cases receive a reprieve and both sides bear a burden of continuing costs because litigation may continue.

Defendants may question the efficiency, cost effectiveness and fairness of such a system, particularly after a *Daubert* hearing where both parties were allowed to present expert testimony before a panel²⁵² and the judge ruled in defendant’s favor.²⁵³ This points to an interesting question arising from the *Daubert* mandate: on which side should the burden of incomplete proof lie? The Supreme Court provided an answer in *Daubert* stating that “a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.”²⁵⁴ Thus, the balance in a particular case is struck in favor of resolving disputes efficiently and finally

243. See *In re New York State Silicone Gel Breast Implant Liab.*, 656 N.Y.S.2d 97, 99 (N.Y. Sup. Ct. 1997) (determining severance of “the plaintiffs’ claims for local injuries from the plaintiffs’ claims for systemic disease” was proper and that “[t]he court should wait to hear the systemic injury claims until the work of the federal 706 panel is completed”); *In re Breast Implant Cases*, 942 F. Supp. 958, 961 (E. and S.D.N.Y. 1996); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1394 (D. Or. 1996).

244. 942 F. Supp. at 958.

245. See *id.* at 959.

246. *Id.* at 961.

247. *Id.*

248. 947 F. Supp. at 1387.

249. *Id.* at 1394.

250. *Id.* at 1392, 1393 & n.9.

251. *Id.* at 1414-15.

252. See *id.* at 1392-93.

253. See *id.* at 1414.

254. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

rather than waiting for scientific certainty.²⁵⁵ A court-appointed panel utilized early in the litigation process, such as during an admissibility hearing, would strike a better balance of party autonomy, efficiency and fairness.

2. *Daubert Panel Model*.—In contrast to Judge Pointer's appointment of an expert panel to testify at trial, Oregon Federal Judge Robert E. Jones in *Hall v. Baxter Healthcare Corp.*²⁵⁶ appointed a panel of experts to assist him in making preliminary findings in a Rule 104(a) hearing.²⁵⁷ Defendants in the case made "motions in limine to exclude testimony by plaintiffs' experts concerning any causal link between silicone breast implants and the alleged systemic disease."²⁵⁸ In order to make an effective ruling on this issue in his role as "gatekeeper," Judge Jones used his inherent power to appoint a panel of independent advisors, one each in the fields of epidemiology, rheumatology, immunology/toxicology, and polymer chemistry.²⁵⁹ Thus, Judge Jones addressed a similar issue with a similar panel, but using a different procedure.

Specifically, the *Daubert* Panel model has the following characteristics. Each party submitted materials that their respective experts would rely upon along with transcripts of testimony the expert may have given at similar trials.²⁶⁰ All parties to the litigation participated fully in a Rule 104(a) hearing, where experts on both sides gave testimony and took questions from counsel on both sides, the court, and the expert panel members.²⁶¹ Upon completion of the testimony, each party gave a videotaped summation for use by the judge and the expert advisors.²⁶² Judge Jones developed a questionnaire for the experts with input from the parties.²⁶³ Each panel expert submitted a written report answering the proffered questions and any other pertinent questions submitted by counsel that the expert felt appropriate to educate Judge Jones.²⁶⁴ Parties were then given the opportunity to challenge each *Daubert* Panel expert's findings.²⁶⁵

Although technically not a panel appointed under Rule 706, the *Daubert* Panel model seems to incorporate some of the procedural safeguards of Rule

255. See *id.*; see also Black et al., *supra* note 8, at 750 (commenting, "the Court also seems to acknowledge that trial judges will often exclude evidence even though exclusion might limit the search for truth").

256. 947 F. Supp. at 1387.

257. *Id.* at 1391; see also *Daubert*, 509 U.S. at 592-93 ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the reasoning or methodology underlying the [proposed expert's] testimony is scientifically valid and . . . can be applied to the facts in issue." (footnote omitted)); FED. R. EVID. 104(a).

258. *Hall*, 947 F. Supp. at 1391.

259. *Id.* at 1392-93.

260. *Id.*

261. *Id.*

262. *Id.* at 1393.

263. *Id.* at 1393-94.

264. *Id.* at 1394.

265. *Id.*

706.²⁶⁶ First, the parties submitted relevant documents for review by the panel²⁶⁷ and participated in developing the questionnaire presented to the expert panel members to guide their report writing.²⁶⁸ In fact, experts received copies of all pertinent written questions from the parties.²⁶⁹ This appears to satisfy the requirement of participation by the parties in advising the experts of their duties as required by Rule 706(a).²⁷⁰ Each party evidently reviewed a report by each appointed expert because each questioned the experts about their findings in the presence of the judge.²⁷¹ This could, in effect, suffice for a “cross-examination.”

A minimal opportunity to challenge the court-appointed panel experts’ findings may prove insignificant for purposes of a *Daubert* hearing. The safeguards embodied in Rule 706 exist to minimize the appointment of non-neutral experts by a judge²⁷² and ensure notification of the appointment to the parties early in the litigation.²⁷³ Cross-examination of the court-appointed expert panel members may bring out hidden bias.²⁷⁴ The panel here, however, is being used for admissibility purposes to help the judge determine the integrity of an expert’s methodology. Disagreement by the panel members on the validity of the methodology should alert the judge and the parties to potential bias within the panel. In addition, the *Daubert* Panel model allows the parties to question the experts’ reports,²⁷⁵ providing them an opportunity to raise the issue of bias for the judge’s consideration. Further, appointment of the panel comes early in the litigation process, protecting the parties from surprise. Once the judge becomes aware that the parties intend to offer expert testimony, her “gatekeeping” responsibilities²⁷⁶ and her managerial role as set out in the Federal Rules of Civil Procedure,²⁷⁷ require the judge to seek information pertaining to the integrity of the expert’s testimony. In addition, the parties themselves become aware of the other party’s intent to use experts during the discovery process²⁷⁸ and should have responsibility for bringing questionable expert opinions to the judge’s attention.²⁷⁹

266. See *supra* notes 61-66 and accompanying text.

267. *Hall*, 947 F. Supp. at 1392-93.

268. *Id.* at 1393.

269. Only one question, specific to an individual plaintiff, was omitted. *Id.* at 1394 & n.15.

270. FED. R. EVID. 706(a).

271. *Hall*, 947 F. Supp. at 1394.

272. See *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 932 (2d Cir. 1962) (Hincks, J., dissenting in part).

273. See *id.*

274. See Gross, *supra* note 70, at 1168 (discussing the purposes of cross-examination of expert witnesses).

275. See *Hall*, 947 F. Supp. at 1394.

276. See *Daubert v. Merrell Dow Pharm., Inc.*, U.S. 579, 597 (1993); see also *supra* note 3.

277. See FED. R. CIV. P. 26.

278. See *id.*

279. This type of responsibility makes sense in light of the control given to parties over the discovery process by the Federal Rules of Civil Procedure. FED. R. CIV. P. 26(f).

Some may argue that the *Daubert* Panel model mimics a trial of experts to a jury of their peers, undermining the jury process because the appointed panel's point of view is outcome determinative.²⁸⁰ However, for the purpose of "gatekeeping" expert evidence as mandated by *Daubert*, the judge must make a ruling of law—the reliability and fit of expert testimony. With the *Daubert* Panel model, party autonomy and adversarial aspects of litigation such as party presentation of evidence and cross-examination of potential witnesses remain intact throughout the process.²⁸¹ The *Daubert* Panel model might actually restore skeptics' faith in the adversarial process because it is dependent on the presentation of the parties. The plaintiff's bar, in particular, may find their concerns about the opinion of one court-appointed expert being outcome determinative²⁸² put to rest with the *Daubert* Panel model. First, each expert on the panel, in effect, acts as a check on the others. The parties also act as a check on the potential bias of the experts since they participate in the process to a great degree. In addition, keeping party presentation of the evidence and the opportunity to cross-examine party experts as part of the model preserves faith in the judicial system.²⁸³

The *Daubert* Panel model has other advantages. In Rule 104(a) hearings, the rules of evidence do not apply.²⁸⁴ This enhances the interaction between the parties' experts, the court-appointed panel, and the judge.²⁸⁵ In turn, the interaction strengthens the appearance of fairness in the *Daubert* ruling process²⁸⁶ and allows for more education of the judge on critical areas of concern.²⁸⁷

Additionally, assume the *Daubert* Panel findings and the subsequent ruling in the *Hall* case found a sufficient foundation for the plaintiff's experts' evidence, and the case goes to trial. The traditional autonomy of the parties in

280. See, e.g., Relkin, *supra* note 72, at 2257 (arguing court-appointed experts in a *Daubert* setting will undermine party autonomy and the jury process because the appointed expert point of view will be outcome determinative). However, one commentator advocates using a peer review approach to admitting scientific evidence, citing Judge Jones' *Daubert* Panel with approval. See Pinsky, *supra* note 128, at 553.

281. See *supra* notes 270-71 and accompanying text.

282. See Relkin, *supra* note 72, at 2257. Defendant's counsel express concerns also. See Gross, *supra* note 70, at 1199; see also Order 31, *supra* note 20, at F2 & n.3 (reporting that defendants objected to formation of National Panel for reasons the judge found unclear).

283. See Longan, *supra* note 15, at 301.

284. FED. R. EVID. 104(a).

285. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1993 n.11 (D. Or. 1996). Judge Jones states the relaxed Rule 104(a) standard "was remarkably effective, both in permitting the parties to focus on presenting their evidence and in expediting the proceeding." *Id.*

286. See Longan, *supra* note 15, at 301.

287. See, e.g., Lubit, *supra* note 81, at 148-50 (suggesting judges "empanel[] qualified and neutral experts to independently evaluate[] scientific evidence" in a *Daubert* capacity); Pinsky, *supra* note 128, at 571-72 (suggesting judges hold a peer review colloquia session with outside experts to better educate themselves on the scientific issues relevant to making an expert testimony admissibility ruling).

presenting their cases to the jury is preserved because the parties' expert evidence passed the Rule 702 requirement. There is less "junk science" and a primary justification for court-appointed experts testifying at trial no longer exists. This, perhaps, is the type of balance the Supreme Court expected from its ruling in *Daubert*: a respect for the autonomy of the parties in presenting evidence to the jury, balanced by integrity of the scientific information the jury hears to minimize its confusion. The adversarial process is maintained with restored trust in the judicial process because of more consistent jury verdicts.

C. Comparing Models

A major goal of our legal system is administering justice efficiently.²⁸⁸ Our legal system favors the adversarial process because of its appearance of fairness to the parties and because of the importance of party autonomy in our culture.²⁸⁹ Our system values truth as well.²⁹⁰ When the truth turns on scientific questions, these two sets of values seem to clash.²⁹¹ The models discussed here balance party autonomy and scientific certainty in slightly different ways.

In each model, parties participate in educating the panel members on the scientific points of view. Parties' experts present evidence and answer questions of the panel members in a hearing format, to clarify the foundation for their opinions.²⁹² This process of educating the panel members serves to educate the judge on the scientific issues, since he is also an active player in the process.²⁹³ Participation by the parties encourages them to present the clearest evidence of their case and focuses attention on the key issues in dispute. Moreover, complete disclosure of expert testimony early in the litigation enhances the appearance of fairness in the judicial process.

Both models also require the court-appointed experts to summarize their findings individually, based on questions submitted by the judge. Parties participate in developing the questions for the panel experts.²⁹⁴ Panel members may discuss or question each other under each model; however, the actual

288. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399-400 (1973).

289. See Longan, *supra* note 15, at 300. Longan lays out the elements of perceived fairness as "the existence of an impartial decision maker and party autonomy with respect to the presentation of the case." *Id.* (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 706-712 (1989)).

290. See Gross, *supra* note 70, at 1114 (outlining the types of witnesses leading to distortions in truth).

291. *Id.*

292. See *supra* notes 209, 260-62 and accompanying text.

293. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1393 (D. Or. 1996); and see Order 31E, *supra* note 200, at C-1.

294. See *supra* notes 211, 261-63 and accompanying text.

procedure for doing so is slightly different.²⁹⁵ In addition, each party questions the panel experts about their findings.²⁹⁶

At this point the models diverge. The National Panel model prepares testimony of panel experts for use at trial. Following the procedural safeguards of Rule 706,²⁹⁷ testimony of each National Panel expert is taken at a deposition-type hearing with the judge presiding and the parties cross-examining each expert.²⁹⁸ Videotaped depositions of the panel experts provide the trial judge with either a basis for a pre-trial admissibility hearing or with court-appointed expert witnesses for use at trial at the judge's discretion.²⁹⁹

In contrast, the *Daubert* Panel model serves to educate the judge. The judge participates fully in questioning the party experts during a Rule 104(a) hearing.³⁰⁰ Parties cross-examine each other's experts³⁰¹ and provide summation of their arguments for review by the panel experts.³⁰² Neither party cross-examines the court-appointed experts.³⁰³ Each may, however, challenge the written findings of the experts in the presence of the judge.³⁰⁴

The most fundamental difference between the two models is whether the parties are given the opportunity to cross-examine the court-appointed experts. In the National Panel model, the parties cross-examine the court-appointed experts.³⁰⁵ In the *Daubert* Panel model, the parties challenge the expert findings in the presence of the judge.³⁰⁶ Cross-examination is a tool for gleaning additional facts,³⁰⁷ attacking credibility,³⁰⁸ safeguarding reliability,³⁰⁹ and achieving fairness.³¹⁰ Similarly, a party's control over the presentation of its case is a fundamental element of the adversarial system.³¹¹

In the National Panel model, cross-examination of the court-appointed panel

295. *Compare Hall*, 947 F. Supp. at 1393, with Order 31E, *supra* note 200, at C-2.

296. *See supra* notes 215-17, 261 and accompanying text.

297. *See supra* notes 58-63 and accompanying text.

298. *See supra* notes 215-16 and accompanying text.

299. *See supra* notes 218-22 and accompanying text.

300. *See Hall*, 947 F. Supp. at 1393.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 1394.

305. *See Order 31, supra* note 20, at F-6.

306. *See Hall*, 947 F. Supp. at 1394.

307. *See* KENNETH S. BROUN, ET AL., MCCORMICK ON EVIDENCE § 31, at 41 (John William Strong, ed., student abr. 4th ed. 1992).

308. *See id.*

309. *See id.*

310. *See id.* at 42; *see also* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (stating that vigorous cross-examination is one of the "appropriate means of attacking shaky but admissible evidence").

311. *See Longan, supra* note 15, at 301 (discussing the importance of presenting one's own case to litigants).

points out inherent bias in the experts' opinions, and perhaps, affects the experts' credibility with the jury. However, the panel testimony at trial usurps the parties' control over the presentation of their cases and may step too far into the jury box. Carefully preserved in the National Panel model is the individuality of each expert's opinion because each testifies independently.³¹² If jury members perceive consistency in the panel members' testimony and know their court-appointed status, the jury is likely to follow the perceived consensus of the group.³¹³ Even apparent consensus of the experts in a panel implies deliberation which is the function of the jury. The parties' perception of fairness in the process will suffer as a result.³¹⁴ The National Panel model has positive advantages in the multidistrict litigation context.³¹⁵ However, presenting panel expert testimony at trial strays too far from traditional notions of party autonomy and the right to a jury trial.

A court-appointed panel model allowing the parties to present their cases, such as the *Daubert* Panel model, is likely the best choice to preserve autonomy of the parties. First, it preserves the parties' control over presentation of their cases at trial. This model allows for full disclosure of the party experts' testimony for the court-appointed panel and the judge. Thus, the parties themselves participate in supplementing the judge's knowledge of the technical issues in the case. Additionally, judges may make better assessments of the party experts' credibility since judges hear both the direct and cross-examination of the party experts and the additional questions by the expert panel. Armed with the opinions of the court-appointed panel, the parties' comments on the appointed experts' findings, and the judge's own assessment of the credibility of the party experts, the judge is well equipped to carry out his responsibilities as "gatekeeper" of scientific testimony. Once the integrity of the evidence is decided, the parties retain complete control over presentation of evidence to a jury.

The *Daubert* Panel model also encourages parties to prepare well before trial to present the foundation elements of the science they plan to use in their cases. The process of presenting expert testimony and responding to questions by the expert panel, the judge and opposing counsel, prepares the parties for making coherent, simple and sound presentations of their scientific evidence at trial. In addition, this pretrial process clarifies points of contention between the parties,

312. See Order 31, *supra* note 20, at F-4, F-5; see also Order 31E, *supra* note 200, at C-2 (referring to guidelines for court-appointed experts if they need assistance from other experts).

313. See *supra* notes 148-50 and accompanying text.

314. See Relkin, *supra* note 72, at 2269.

315. This Note attempts to analyze the two models for application by an individual judge faced with an expert evidence challenge. The combined model, briefly discussed here, is likely the best approach for multidistrict litigation purposes because it provides the greatest flexibility for trial judges on remand while serving the efficiency goals of 28 U.S.C. § 1407 (1994). If the transferee judge makes a ruling on summary judgment by one of the parties based on insufficiency of a party's expert evidence, the combination procedure would also preserve testimony for use at trial in case of reversal on appeal. Further analysis of this issue is beyond the scope of this paper.

and potentially, furthers settlement negotiations or shortens the trial process. The *Daubert* Panel model improves the integrity of scientific testimony at trial while preserving party autonomy.

An alternative model emerges from both the National Panel model and the *Daubert* Panel model. Such an alternative would include an opportunity for cross-examination of both the panel experts (the National Panel model), and the party experts (the *Daubert* Panel model). Preserving party autonomy on both fronts guarantees party autonomy even if the court-appointed panel testified at trial through videotaped depositions. In the case of a judge faced with a group of toxic tort cases within his own jurisdiction, cross-examination of the panel experts is unnecessary. In the *Daubert* Panel model, the judge considers the parties' assessments of the panel experts' reports before making a ruling. In addition, other safeguards exist to compensate for not cross-examining the expert panel. These include the focus of admissibility hearings on scientific methodology, not conclusions,³¹⁶ and the relaxed evidentiary guidelines of Rule 104(a).³¹⁷ Also, party control over the discovery process³¹⁸ performs a function similar to cross-examination because such control encourages the parties to bring panel expert bias and credibility issues to the judge's attention early in the process.

Judges looking for a solution to expert venality and questionable science should consider using the *Daubert* Panel model as a solution. Using a panel of experts to assist the judge in his "gatekeeping" role balances the party autonomy, efficiency and fairness goals of our judicial system most effectively.

CONCLUSION

Expert panels will become an important part of toxic tort and product liability litigation in the Twenty-first Century. Judges faced with a decision to impanel court-appointed experts should consider party autonomy, efficiency and fairness concerns underlying the use of such bodies during the trial process.

Use of court-appointed expert panels in pretrial admissibility hearings allows for the best of both worlds: good science and true adversarial presentation of the issues. In addition, it provides an incentive to the parties to be prepared for challenges to their scientific method well before trial. Benefits also include productivity increases in the pretrial settlement process, narrowing of issues before trial, and improving the quality of expert testimony during trial. Using court-appointed panels to testify at trial is unnecessary with these benefits of the *Daubert* Panel model. Court-appointed expert panels used to assist the judge in evaluating the foundation of scientific testimony offered by the parties is the best way to improve the quality of testimony presented in toxic tort and product liability actions.

316. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

317. FED. R. EVID. 104(a) provides that the court "is not bound by the rules of evidence except those with respect to privileges."

318. See FED. R. CIV. P. 26(f).

JAFFE V. REDMOND: THE SUPREME COURT'S DRAMATIC SHIFT SUPPORTS THE RECOGNITION OF A FEDERAL PARENT-CHILD PRIVILEGE

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"Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."¹

INTRODUCTION

The Supreme Court's recent decision in *Jaffe v. Redmond*,² recognizing a federal psychotherapist-patient privilege, supports the recognition of a federal parent-child privilege. The *Jaffe* decision reflects a major shift in the Supreme Court's approach to the creation of new privileges under Federal Rule of Evidence ("FRE") 501.³ This shift to a more permissive view of new privileges, along with other legal and social policy arguments, supports a limited evidentiary privilege protecting communications between parents and children.

After a brief overview of the rationale for and historical development of current privilege law, this Note discusses competing approaches to the development of privileges. In Part III, after examining the Supreme Court's decision in *Jaffe*, this Note explains the significance of the decision. In Part IV, this Note specifically analyzes a parent-child privilege by discussing: (A) the current state of the privilege; (B) the arguments previously advanced in support of the privilege; (C) federal and state court decisions rejecting the privilege; and (D) recent developments in reaction to the *Jaffe* decision. This Note then asserts that current legal arguments and social policies support the recognition of a limited parent-child privilege that courts should apply using a case-by-case balancing approach. Finally, the parameters of a parent-child privilege are defined.

I. RATIONALE FOR AND HISTORICAL DEVELOPMENT OF CURRENT PRIVILEGES

The law of privilege is an amazing area of law because it involves an area of communications that no one can reach—not a judge, a court, or the government. No other legal doctrine affords such protection to communications between citizens.⁴ "The word 'privilege' is derived from the Latin phrase 'privata lex,' meaning a private law applicable to a small group of persons as their special

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1. *Pearse v. Pearse*, 63 Eng. Rep. 950, 957 (1846).

2. 518 U.S. 1 (1996).

3. See Daniel Capra, *A "New" Privilege: Parent-Child*, N.Y. L.J., May 9, 1997, at col. 1.

4. Interview with Professor William F. Harvey, Professor Emeritus, Former Dean, Indiana University School of Law—Indianapolis (Nov. 24, 1997).

prerogative.”⁵ Privileges are different from other rules of evidence. They exclude reliable, relevant evidence in order to protect an interest deemed by a court or legislature to be more important than the interest served by admitting the evidence.⁶ Additionally, some scholars explain how some privilege rules are unique because they also affect behavior (such as the interaction between husband and wife) outside of the courtroom.⁷

Privileges are controversial because they inhibit the common-law principle that “the public has a right to every man’s evidence.”⁸ One goal of the adversarial judicial system is to place all relevant evidence before the trier of fact.⁹ Although privileges impede this goal, they have been a part of the American judicial system since the founding of our country. Based on English common law, two marital privileges and the attorney-client privilege were recognized in American common law. The first marital privilege evolved from the English spousal disqualification rule by which a wife was viewed as incompetent to testify against her husband.¹⁰ This incompetence stemmed from the medieval view of husband and wife as a single entity (since a wife did not have her own legal identity) and from the rule that one could not testify in any action in which he had an interest.¹¹ This spousal disqualification rule became ingrained in both English and American common law. It was finally abolished in England by the English Act of 1853, and replaced by a privilege that forbade a husband or wife from being compelled to disclose any communications made by the other during the marriage.¹² Eighty years later, the United States Supreme

5. Bruce Neal Lemons, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 BYU L. REV. 1002, 1003.

6. See David A. Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 ST. MARY’S L.J. 35, 37 (1987) (citing H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 62-63 (1983)).

7. See Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, The Expansive Antithesis, and the Contextual Thesis*, 73 NEB. L. REV. 511, 514 (1994).

8. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2192 (3d. ed. 1940)).

9. See Brian S. Faughnan, Comment, *Evidence—Jaffe v. Redmond: Establishing the “Psychotherapist-Patient Privilege” Under Rule 501 of the Federal Rules of Evidence*, 27 U. MEM. L. REV. 703, 705 (1997).

10. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1563, 1564 (1985) [hereinafter *Developments in the Law*]. Eventually this rule became gender neutral, and neither spouse was permitted to testify against the other. See Imwinkelried, *supra* note 7, at 512 n.4.

11. See Gregory W. Franklin, *The Judicial Development of the Parent-Child Testimonial Privilege: Too Big For Its Britches?*, 26 WM. & MARY L. REV. 145, 152 (1984). But cf. *Developments in the Law*, *supra* note 10, at 1564-65 (noting Dean Wigmore’s alternative explanation for the development of the spousal disqualification rule).

12. See MCCORMICK ON EVIDENCE § 78 (John W. Strong et al. eds., 4th ed. 1992).

Court also abolished the spousal disqualification rule in *Funk v. United States*,¹³ and replaced it with an adverse testimonial privilege which permits a witness to refuse to adversely testify against her spouse. The second marital privilege that developed from English common law was first recognized in the United States in the 1850's, and protects confidential marital communications.¹⁴ Both marital privileges are still recognized in the United States today and are justified on utilitarian grounds: the adverse testimony privilege "provides social benefits by preventing marital discord"¹⁵ and the confidential communications privilege "fosters openness between spouses by ensuring that none of their confidences will be revealed in court."¹⁶

The attorney-client privilege originated from Roman law and was also recognized at English common law.¹⁷ "[E]arly common law courts reasoned that the lawyer, as a gentleman, should not besmirch his honor by revealing his client's secrets."¹⁸ Inducing a client's candor with his or her attorney became the primary rationale for the privilege in the Nineteenth Century.¹⁹ It is this rationale that first influenced the recognition of the privilege by American courts and that primarily supports the recognition of the privilege today; some have suggested that privacy considerations also support the recognition of an attorney-client privilege.²⁰

Until well into the Nineteenth Century, Congress and state legislatures were content to allow the courts to develop expansions and exceptions to the English common law of privileges.²¹ At that time, faced with a "codification movement and enthusiastic scholars forcing it along, state legislatures began the attempt to codify evidence codes."²² This state legislative development of privileges continued, even though the judicial development of privileges virtually halted at the beginning of the Twentieth Century as judges increasingly came to view privileges as hindrances to litigation and impediments to the fact-finding

13. 290 U.S. 371 (1933).

14. See *Developments in the Law*, *supra* note 10, at 1565 (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 2333 (John T. McNaughton rev. ed. 1961) [hereinafter EVIDENCE IN TRIALS]).

15. *Id.* at 1577 (citing CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 66 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter CLEARY] and EVIDENCE IN TRIALS, *supra* note 14, § 2228, at 216-17).

16. *Id.* (citing CLEARY, *supra* note 15, § 83 and EVIDENCE IN TRIALS, *supra* note 14, § 2332, at 642).

17. See Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 594 (1987) (citing Max Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928)).

18. Franklin, *supra* note 11, at 148 (citation omitted).

19. See *id.*

20. See MCCORMICK ON EVIDENCE, *supra* note 12, § 87.

21. See Watts, *supra* note 17, at 588.

22. See *id.* (footnote omitted).

process.²³ Privilege development even extended to common-law privileges, and resulted in codification of the common law husband-wife and attorney-client privileges in most states.²⁴

The development of privilege law by state legislatures resulted in a wide disparity of privilege rules in the United States.²⁵ Because of this disparity, states recognize different privileges in state judicial actions. All states currently recognize some form of husband-wife and attorney-client privilege.²⁶ Most states also recognize a privilege to protect certain government information.²⁷ Additionally, due to the increasing acceptance of psychological counseling in the 1950's, all states recognize some form of psychotherapist-patient privilege.²⁸ Although probably not recognized at common law, all states have now adopted a clergyman-penitent privilege for confidential communications,²⁹ which is generally recognized to be held by the communicant.³⁰ A privilege for physician-patient communications also did not exist at common law.³¹ New York was the first state to enact a physician-patient privilege in 1828.³² Today, the rationale justifying this privilege is that for patients to get the best care, they need to freely "disclose all matters which may aid in the diagnosis and treatment of disease and injury."³³ Analogous to the attorney-client privilege, communications between accountants and their clients are currently privileged in about one-third of the states,³⁴ and a substantial number of states recognize a journalist-news source privilege held by the journalist.³⁵

The disparity in state-created privileges raised concern among legal scholars, lawyers, and jurists that prompted calls for national reform and unification of evidentiary rules.³⁶ One result of this concern was Congress' 1934 grant of power to the Supreme Court to promulgate rules of evidence for the federal appellate and district courts.³⁷ The Supreme Court is required to submit its proposed rules to Congress, which then has the discretion to accept or reject the

23. See MCCORMICK ON EVIDENCE, *supra* note 12, § 75 (citation omitted).

24. See *id.*

25. See Watts, *supra* note 17, at 588.

26. See MCCORMICK ON EVIDENCE, *supra* note 12, § 76.2.

27. See *id.*

28. See M. Leigh Svetanics, Note, *Beyond "Reason and Experience": The Supreme Court Adopts a Broad Psychotherapist-Patient Privilege in Jaffe v. Redmond*, 41 ST. LOUIS U. L. J. 719, 720 (1997).

29. See MCCORMICK ON EVIDENCE, *supra* note 12, § 76.2.

30. See *id.*

31. See *id.* § 98.

32. See Watts, *supra* note 17, at 595.

33. MCCORMICK ON EVIDENCE, *supra* note 12, § 98.

34. See *id.* § 76.2.

35. See *id.*

36. See Watts, *supra* note 17, at 588.

37. 28 U.S.C. § 2072 (1994).

rules as proposed, or to draft amendments to the rules.³⁸ Congress generally acquiesced to the rules promulgated by the Supreme Court until 1973, when the Court approved its Advisory Committee's draft of the Proposed Rules of Evidence and sent the draft to Congress for adoption.³⁹ Received by a skeptical Congress, the draft was highly debated with Proposed Article V that governed the application of privileges the "primary target for criticism" by Congress.⁴⁰ Proposed Article V recognized nine non-constitutional privileges, including "required reports, attorney-client, psychotherapist-patient, husband-wife, clergyman-communicant, political vote, trade secrets, secrets of state and other official information and identity of informer."⁴¹ Additionally, the proposed rules would have greatly narrowed the scope of the existing privileges⁴² and restricted the judicial development of privileges by freezing federal privilege law and denying federal courts the power to create new privileges.⁴³ After much debate and controversy, Congress rejected the proposed rule containing specific privileges and chose to adopt a much amended and broader privilege rule—FRE 501.⁴⁴ By granting federal courts the power to develop federal privilege law without any guidance as to how to exercise that power, the language of FRE 501, as adopted by Congress, has resulted in controversy over the scope of the federal courts' power to develop new privileges.⁴⁵

38. *Id.* § 2074.

39. See Imwinkelried, *supra* note 7, at 512 (citing COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES TRANSMITTING THE PROPOSED RULES OF EVIDENCE OF THE UNITED STATES COURTS AND MAGISTRATES, H.R. DOC. NO. 46 (1973)).

40. *Id.* at 513 (citing 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 509-3 (1993)).

41. MCCORMICK ON EVIDENCE, *supra* note 12, § 75.

42. See Jeff. M. Sandlow, *Confidential Communication Between Parent and Child: A Constitutional Right*, 16 SAN DIEGO L. REV. 811, 816 (1979). The author suggests that by rejecting this narrowing of existing privileges, and by enacting broad privileges protecting confidential communication, Congress "was deferring to the societal mandate that a zone of privacy be maintained." *Id.* (footnote omitted).

43. See Imwinkelried, *supra* note 7, at 518.

44. As adopted, FRE 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

45. See Imwinkelried, *supra* note 7, at 515; See also *infra* notes 47-55 and accompanying text.

II. COMPETING APPROACHES TO THE CREATION OF NEW PRIVILEGES

The controversy surrounding privilege law exists on two levels. The first involves the development of new privileges and results from differing federal court interpretations as to whether FRE 501 permits recognition of novel privilege claims. The second is much broader as it involves different justifications for and beliefs about the value and use of privileges in judicial proceedings. Both of these controversies have affected the decisions of federal courts addressing privilege claims, and both are evident in the Supreme Court's most recent ruling on a novel psychotherapist-patient privilege.⁴⁶

As adopted, FRE 501 does not provide clear guidelines for federal courts to use in addressing novel privilege claims. Federal courts have widely differed as to the proper statutory interpretation of FRE 501's mandate to "use principles of the common law" in light of "reason and experience" in developing privilege law.⁴⁷ One interpretation of the rule (referred to by some commentators as the "restrictive view") is that it precludes courts from recognizing any new privilege that did not exist at common law.⁴⁸ As one commentator has suggested, this view lacks evidentiary support.⁴⁹ Not only did Congress refuse to adopt the proposed privilege rule containing nine specific privileges, but it also rejected a prohibition on the judicial development of new privileges.⁵⁰ This suggests that Congress did not intend to preclude the development of new privileges. Additionally, the Supreme Court explicitly rejected this restrictive view of privileges when it noted that "[i]n rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privileges."⁵¹

A second interpretation of FRE 501 is that even if the rule does not preclude the recognition of new privileges, it "erects a 'strong presumption' against the creation of novel privileges."⁵² The Supreme Court followed this cautionary approach when it refused to recognize a privilege for peer review materials,

46. *Jaffe v. Redmond*, 518 U.S. 1 (1996); *see also infra* notes 73-120 and accompanying text.

47. FED. R. EVID. 501.

48. *See Imwinkelried, supra* note 7, at 524.

49. *See id.*

50. *See id.* at 525-28. The author notes that one court has used the restrictive view when evaluating a novel privilege claim. *See In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989). *See also* Daniel Capra, *The Federal Law of Privileges*, 16 LITIG. 32 (Fall 1989).

51. *Trammel v. United States*, 445 U.S. 40, 47 (1980).

52. *Imwinkelried, supra* note 7, at 528 (quoting Capra, *supra* note 50, at 35-36); *See also* Molly Rebecca Bryson, Note, *Protecting Confidential Communications Between a Psychotherapist and Patient: Jaffe v. Redmond*, 46 CATH. U. L. REV. 963 (1997). The author explained that "[l]ower courts' caution [in recognizing new privileges] stems from the reasonable inference that Congress did not support the recognition of new privileges when it chose to adopt the current language of Rule 501, rather than ratifying the nine privileges the Supreme Court recommended." *Id.* at 977.

stating that it did not want to use its power under Rule 501 “expansively.”⁵³ A third interpretation of FRE 501 takes two different forms, and both apply a more expansive approach to the creation of new privileges. Some federal courts believe that FRE 501 allows them to be *more* receptive to privilege claims than federal courts were permitted to be at common law.⁵⁴ Other commentators have suggested that federal courts are as free to recognize new privileges under FRE 501 as they were under the common law.⁵⁵

Federal courts have not only struggled with their authority (or lack thereof) to recognize new privileges, but have also struggled with which rationale or justification for privileges to apply when evaluating a novel privilege claim. Historically, courts have used two different approaches to the creation of new privileges. While both approaches balance the need for the protected evidence against the interests of the individual and society, the approaches vary regarding the use and value of testimonial privileges.⁵⁶

The first approach (one of the most influential approaches for the creation of new privileges) is the traditional utilitarian justification of Dean John H. Wigmore.⁵⁷ His approach “supports the idea of using a privilege to encourage open communications within a confidential relationship that relies on such communication for its success.”⁵⁸ Since this approach evaluates the effect that

53. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). *See also* *United States v. Burtrum*, 17 F.3d 1299, 1301 (10th Cir. 1994) (refusing to recognize psychotherapist privilege in criminal cases); *Mason v. Stock*, 869 F. Supp. 828, 834 (D. Kan. 1994) (refusing to recognize self-critical analysis privilege).

54. *See Imwinkelried, supra* note 7, at 530. *See also In re John Doe*, 964 F.2d 1325 (2d Cir. 1992) (psychotherapist-patient privilege); *Covell v. CNG Transmission Corp.*, 863 F. Supp. 202, 205 (M.D. Pa. 1994) (psychiatrist-patient privilege); *United States v. D.F.*, 857 F. Supp. 1311, 1319-20 (E.D. Wis. 1994) (psychotherapist-patient privilege); *Mann v. University of Cincinnati*, 824 F. Supp. 1190, 1197-98 (S.D. Ohio 1993) (general medical privilege).

55. *See Imwinkelried, supra* note 7, at 535. Imwinkelried ultimately concludes that the context of FRE 501 shows that Congress did not “reach the merits of the question of whether the courts should be receptive or hostile to privilege claims” and that courts should therefore decide such claims by “balancing the loss of probative evidence against the extrinsic values fostered by the privileges.” *Id.* at 541.

56. *See* J. Tyson Covey, Note, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879, 886 (1990).

57. Dean Wigmore’s approach uses the following four factors:

1. The communication must originate in confidence that it will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure must be greater than the benefit thereby gained for the correct disposal of the litigation.

8 JOHN H. WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961) [hereinafter WIGMORE].

58. Svetanics, *supra* note 28, at 732.

judicial recognition of a particular privilege will have on behavior outside of the courtroom, the approach is often referred to as an instrumental justification for privileges.⁵⁹ Wigmore's approach balances the benefit to society from encouraging a particular class of communication against the cost of impeding the fact-finding process.⁶⁰ A strong believer in the duty to testify, Wigmore focuses on extrinsic social policy and the systematic effects of a privilege claim, and does not consider the specific harm to a litigant whose privilege claim is denied.⁶¹ A majority of courts have followed Wigmore's narrow and constrictive approach in considering novel privilege claims.⁶²

Wigmore's justification for privileges requires certainty. A privilege beneficiary will be encouraged and convinced to share confidences when she is able to predict with certainty that the judiciary will find the confidence privileged. If unable to predict the privilege's application, the beneficiary may not feel secure enough to share her confidences. Critics of Wigmore's approach suggest that there is a lack of empirical evidence demonstrating that knowing about a particular privilege influences one's decision to communicate certain information.⁶³ These critics "commonly assert that people typically know little or nothing about their privilege and that, even if they did, the knowledge would rarely alter their communicative behavior."⁶⁴

A competing view regarding the use and value of privileges is referred to as the humanitarian or privacy justification. Under this non-instrumental view, the value of one's privacy in confidential communications is the justification for the privilege.⁶⁵ "Rather than focusing on the systemic impact that compelled disclosures might have on behavior, the privacy rationale focuses on the protection that privileges afford to individual privacy."⁶⁶ Supporters of this view suggest that compelled disclosure of confidences results in both embarrassment from revealing one's secrets to the public, and harm from being forced to betray another's confidence.⁶⁷ The focus is on protecting an individual's privacy interests and not on the utilitarian goal of promoting the public good by

59. See *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1471, 1472 (1985) [hereinafter *Developments in the Law II*].

60. See *id.* at 1473.

61. See *id.* at 1473-74.

62. See Michael B. Bressman & Fernando R. Laguarda, *Jaffe v. Redmond: Towards Recognition of a Federal Counselor-Battered Woman Privilege*, 30 CREIGHTON L. REV. 319, 320 (1997).

63. See, e.g., *Developments in the Law*, *supra* note 10, at 1579-82; Imwinkelried, *supra* note 7, at 543; Daniel W. Shuman & Myron F. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982) (discussing a lack of empirical evidence supporting view that the existence of a psychotherapist-patient privilege is of consequence to patients); Svenatics, *supra* note 28, at 754.

64. *Developments in the Law II*, *supra* note 59, at 1474 (footnote omitted).

65. See Svetanics, *supra* note 28, at 734.

66. *Developments in the Law II*, *supra* note 59, at 1480.

67. See *id.* at 1481.

encouraging the sharing of confidences.⁶⁸

Since it does not attempt to influence the behavior of persons outside the courtroom, the privacy rationale (unlike Wigmore's approach) does not require certainty to be effective. Because certainty is not required, the privilege can be a qualified one that balances the harm of compelled disclosure against the harm of keeping the evidence out of the judicial proceeding.⁶⁹ This balancing process is different from that used by Wigmore's approach. Wigmore's balancing process determines whether the judicial system should recognize an absolute privilege in all proceedings. Under the privacy rationale, the balancing process determines if a privilege should be applied in a particular judicial proceeding. Critics argue that this balancing process is flawed since it is difficult to measure or quantify an individual's privacy interest.⁷⁰

Finally, a third approach to privilege law has been suggested by one commentator.⁷¹ Referred to as a "full utilitarian approach," this view considers both the systemic benefits to society of encouraging communications and the immediate benefits to an individual by protecting privacy.⁷² This approach is purported to be superior to the traditional utilitarian and privacy rationales since it balances all relevant interests.⁷³

III. THE SIGNIFICANCE OF *JAFFE V. REDMOND*

The Supreme Court's decision in *Jaffe v. Redmond*⁷⁴ reflects a dramatic shift in the Court's method of analyzing novel privilege claims. Prior to the *Jaffe* decision, the Supreme Court had used the language of FRE 501 to *limit* existing privileges and to *refuse to adopt* new privileges. This cautionary (and at times restrictive) approach by the Supreme Court greatly influenced the decisions of lower federal courts. Many federal courts declined to recognize new privileges because of their belief that FRE 501 did not give them the authority to honor any

68. See *id.* at 1483. The author suggests that the privacy rationale really is an instrumental approach that only has a different goal or focus than the traditional justification.

[O]rders to compel testimony have two consequences: the invasive disclosure itself and the indirect effects of disclosure on the relevant class of relationships. Thus, the privacy rationale and the traditional justification are both really instrumental approaches that differ only in that they focus, respectively, on the direct and the indirect consequences of compelling testimony.

Id. at 1486.

69. See CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., 23 FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF EVIDENCE § 5422 (1995 & Supp. 1998). The authors further suggest that courts and legislature are more willing to create a qualified privilege that employs a balancing test "as it is less likely to produce injustice." *Id.*

70. See *Developments in the Law II*, *supra* note 59, at 1483.

71. See *id.* at 1484.

72. *Id.* at 1484-86.

73. See *id.* at 1484.

74. 518 U.S. 1 (1996).

privileges that did not derive from the common law.⁷⁵

The *Jaffe* decision involved a claim of psychotherapist-patient privilege, which arose after an on-duty police officer shot and killed a suspect. On June 27, 1991, Officer Mary Lu Redmond shot and killed Ricky Allen when Redmond responded to a police call to an apartment complex.⁷⁶ Redmond alleged that Allen ran out of the apartment building, chasing another man while brandishing a butcher knife. Allen also allegedly disregarded Redmond's repeated commands to drop the knife.⁷⁷ Redmond claimed that she shot Allen when she believed that he was about to stab the man he was chasing.⁷⁸ Petitioner, the administrator of Ricky Allen's estate, filed suit in the United States District Court for the Northern District of Illinois against Redmond and her employer, which at the time of the shooting, was the Village of Hoffman Estates, Illinois. Petitioner alleged that Redmond violated Allen's constitutional rights by using excessive force during the encounter at the apartment complex.⁷⁹ A jury found for the estate.⁸⁰ During the trial, the judge ordered Redmond to give the plaintiff some notes that had been made by Karen Beyer, a licensed clinical social worker who had counseled Redmond after the shooting.⁸¹ Redmond claimed that these notes were protected from involuntary disclosure by a psychotherapist-patient privilege. Even though the district judge rejected this argument, neither Beyer nor Redmond complied with the court's order. The district judge "advised the jury that the refusal to turn over Beyer's notes had no 'legal justification' and that the jury could therefore presume that the contents of the notes would have been unfavorable to respondents."⁸²

Redmond appealed and the Court of Appeals for the Seventh Circuit reversed and remanded for a new trial.⁸³ Using "reason and experience" according to FRE 501, and after balancing the importance of the patient's privacy interest against the evidentiary need for disclosure, the Seventh Circuit concluded that a psychotherapist-patient privilege should be recognized.⁸⁴ Since there was a conflict among the courts of appeals regarding the recognition of a federal psychotherapist-patient privilege,⁸⁵ the United States Supreme Court granted

75. See Bryson, *supra* note 52, at 980.

76. *Jaffe*, 518 U.S. at 4.

77. *Id.*

78. *Id.*

79. *Id.* at 5.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See *id.* at 7. The majority cited the following decisions in noting the conflict among the appeals courts: *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994); *In re John Doe*, 964 F.2d 1325 (2d Cir. 1992); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983); *United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976).

certiorari and, in a 7-2 decision, affirmed the Seventh Circuit's ruling.⁸⁶ Writing for the majority, Justice Stevens turned to the legislative history of FRE 501 and noted that the development of new privileges should be determined on a "case-by-case basis."⁸⁷ Reasoning that the intent of FRE 501 was not to freeze the development of privilege law, Justice Stevens noted how federal courts are to "continue the evolutionary development of testimonial privileges."⁸⁸ He also relied heavily on language from the Court's earlier opinion in *Trammel v. United States*,⁸⁹ a case in which the Court actually *limited* the scope of the common law adverse spousal testimony privilege.

Acknowledging that evidentiary law is based on the maxim that the public has a right to every man's evidence,⁹⁰ the majority determined that exceptions may be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."⁹¹ The majority then determined that reason and experience indicate that a "privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence.'"⁹² The Court enumerated both private and public interests that a psychotherapist-patient privilege would promote. Comparing the privilege to both the spousal and attorney-client privileges, the Court noted how the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust."⁹³ Using a utilitarian approach to privilege law,⁹⁴ the Court reasoned that effective psychotherapy depended on a patient's willingness to frankly and completely disclose information.⁹⁵ The Court also reasoned that the patient must believe a therapist's assurance of confidentiality in order to feel comfortable disclosing private information.⁹⁶ Accordingly, a psychotherapist-patient privilege would encourage the private interest of effective psychotherapy.⁹⁷ Such a privilege would also promote the public's interest in the mental health of its citizenry since the privilege "facilitat[es] the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."⁹⁸ After balancing these private and public interests promoted by the privilege against the value of the evidence protected, the majority concluded, "the likely evidentiary

86. *Jaffe*, 518 U.S. at 8.

87. *Id.* (quoting S. REP. NO. 93-1277, at 13 (1974)).

88. *Id.* at 9 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)).

89. 445 U.S. 40 (1980).

90. *Jaffe*, 518 U.S. at 9 n.8.

91. *Id.* at 9 (quoting *Trammel*, 445 U.S. at 50).

92. *Id.* (quoting *Trammel*, 445 U.S. at 51).

93. *Id.*

94. See *supra* notes 57-64 and accompanying text.

95. *Jaffe*, 518 U.S. at 10.

96. *Id.*

97. *Id.* at 10-11.

98. *Id.* at 11.

benefit that would result from the denial of the privilege is modest.”⁹⁹

The Court further supported its recognition of a psychotherapist-patient privilege by noting that all states had enacted some form of a psychotherapist-patient privilege and reasoning that “the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.”¹⁰⁰ Referring to its earlier decision in *Funk v. United States*,¹⁰¹ the court accepted the policy decisions of the states as reflective of the wisdom in recognizing a psychotherapist-patient privilege.¹⁰²

The Advisory Committee’s inclusion of a psychotherapist-patient privilege in its draft of privilege rules also seems to have influenced the Court’s recognition of an absolute psychotherapist-patient privilege.¹⁰³ In recognizing this absolute privilege, the Supreme Court explicitly rejected the Seventh Circuit’s balancing approach.¹⁰⁴ The Court determined that in order to promote full disclosure by a patient, the patient “must be able to predict with some degree of certainty whether particular discussions will be protected.”¹⁰⁵ Additionally, in one of the most controversial parts of its holding, the Court went a step further than the Seventh Circuit by extending the protection of the privilege to confidential communications made by a patient during therapy to a licensed social worker.¹⁰⁶

Justice Scalia, with the Chief Justice joining in part, strongly dissented.¹⁰⁷ Reminding the majority that the Court had previously used the language of FRE 501 to reject new privileges¹⁰⁸ and to narrow existing privileges,¹⁰⁹ Justice Scalia criticized the majority for ignoring “traditional judicial preference for the truth” and for “creating a privilege that is new, vast, and ill-defined.”¹¹⁰ Justice Scalia also questioned the majority’s determination that the private and public interests in psychotherapy justify creating a new privilege that excludes relevant evidence

99. *Id.*

100. *Id.* at 12-13.

101. 290 U.S. 371, 376-381 (1933) (finding that it was appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both “reason” and “experience”).

102. *Jaffe*, 518 U.S. at 13.

103. *See id.* at 13-14.

104. *Id.* at 17.

105. *Id.* at 18 (quoting *Upjohn v. United States*, 449 U.S. 383, 393 (1981)).

106. *Id.* at 17-18.

107. *Id.* at 18 (Scalia, J., dissenting).

108. *See* *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990) (rejecting privilege for peer review materials); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (refusing to recognize an accountant-client privilege); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege for legislative acts by a member of a state legislature).

109. *See* *United States v. Zolin*, 491 U.S. 554 (1989) (permitting in camera review of documents alleged to come within crime-fraud exception to the attorney-client privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (limiting spousal adverse testimony privilege).

110. *Jaffe*, 518 U.S. at 19-20.

from a judicial proceeding.¹¹¹ The majority's willingness to extend the privilege to licensed social workers¹¹² and to rely on the legislative policy decisions of the states also prompted sharp criticism from Justice Scalia.¹¹³

The Supreme Court's decision in *Jaffe* provoked much scholarly debate about the wisdom of the Court's decision.¹¹⁴ The *Jaffe* decision is controversial mainly because it manifests the Supreme Court's first recognition of a novel privilege claim (one that was not recognized by the common law) under FRE 501. Some commentators argue that the majority's decision is sound because it reflects our current social climate,¹¹⁵ and because the privilege promotes important public and private interests that outweigh the need for the protected evidence.¹¹⁶

Several other commentators have assailed the decision on various grounds. The majority has been criticized for failing to apply correctly the balancing approach mandated by FRE 501,¹¹⁷ for expanding the privilege to licensed social workers¹¹⁸ and for creating an undefined privilege.¹¹⁹

[*Jaffe*] is a strange case as it creates a privilege that extends endlessly. Justice Stevens refers to Congress' earlier rejection of the Advisory Committee's recommendation of a psychotherapist-patient privilege, but then he ultimately decides to recognize the privilege. The court is flying in the face of its own history.¹²⁰

The majority has also been criticized for relying on the decisions of state legislatures in making federal law,¹²¹ and for stepping into a policy debate that Congress is better suited to handle.¹²²

The *Jaffe* decision has refueled the debate over the scope of federal courts' power to recognize new privileges. Since the adoption of the Federal Rules of Evidence in 1975, federal courts have been confused about the correct interpretation of FRE 501 and their institutional competence to recognize new

111. *Id.* at 20.

112. *Id.* at 21.

113. *Id.* at 25-26.

114. See, e.g., Bryson, *supra* note 52, at 963; Faughnan, *supra* note 9; M. Brett Fulkerson, Note, *One Step Forward, Two Steps Back: The Recognized But Undefined Federal Psychotherapist-Patient Privilege*, 62 MO. L. REV. 401 (1997); Jason L. Gunter, Note and Comment, *Jaffe v. Redmond: The Supreme Court Recognizes the Psychotherapist-Patient Privilege in the Federal Courts and Expands the Privilege to Include Social Workers*, 21 NOVA L. REV. 719 (1997); Svetanics, *supra* note 28.

115. See Gunter, *supra* note 114, at 719.

116. See Faughnan, *supra* note 9, at 719-20.

117. See Svetanics, *supra* note 28, at 753-54.

118. See Faughnan, *supra* note 9, at 720.

119. See Fulkerson, *supra* note 114, at 418-24.

120. Harvey, *supra* note 4.

121. See Svetanics, *supra* note 28, at 754.

122. See *id.* at 759.

privileges.¹²³ The Supreme Court's first opportunity to apply FRE 501 to an existing privilege was in 1980.¹²⁴ In *Trammel v. United States*, the Court acknowledged that FRE 501 gives federal courts the authority to develop privilege law, and then used its authority to *narrow* the adverse spousal testimony privilege.¹²⁵ Noting a trend in state law "toward divesting the accused of the privilege to bar adverse spousal testimony,"¹²⁶ the Court held that "the witness-spouse alone has a privilege to refuse to testify adversely."¹²⁷ The court reasoned that if one spouse is willing to testify against the other, then the privilege's justification of trying to preserve marital harmony is likely inappropriate.¹²⁸ The *Trammel* decision proved influential on lower courts in the coming years as "[t]he Court's restriction of the spousal privilege was an implicit signal to lower courts that it would not extend privileges broadly and would not advocate lower courts to do so either."¹²⁹

One month after *Trammel*, the Supreme Court addressed the first of two cases involving a novel privilege claim under FRE 501. In *United States v. Gillock*,¹³⁰ the Court declined to recognize a privilege for state legislators in federal criminal prosecutions.¹³¹ Using a restrictive view¹³² of FRE 501, the Court noted that during the legislative adoption process of FRE 501, "[n]either the Advisory Committee, the Judicial Conference, nor this Court saw fit . . . to provide the privilege sought by Gillock."¹³³ The Court also explained that while the existence of a state privilege should be taken into consideration, state recognition was not dispositive.¹³⁴

In 1990, the Court addressed a second novel privilege claim under FRE 501. In *University of Pennsylvania v. Equal Employment Opportunity Commission*,¹³⁵ the Court used a cautionary approach to privileges and refused to recognize a privilege protecting peer review materials in tenure decisions.¹³⁶ Acknowledging its authority to develop new privileges under FRE 501, the Court cautioned against using this authority expansively.¹³⁷ The Court defined a framework for reviewing novel privilege claims, explaining that a new privilege should not be adopted unless doing so "promotes sufficiently important interests to outweigh

123. See Bryson, *supra* note 52, at 966; see also *supra* notes 47-55 and accompanying text.

124. See *Trammel v. United States*, 445 U.S. 40 (1980).

125. *Id.* at 47, 53.

126. *Id.* at 49-50.

127. *Id.* at 53.

128. *Id.* at 52.

129. Bryson, *supra* note 52, at 978.

130. 445 U.S. 360 (1980).

131. *Id.* at 374.

132. See *supra* notes 48-51 and accompanying text.

133. *Gillock*, 445 U.S. at 367.

134. *Id.* at 368, n.8.

135. 493 U.S. 182 (1990).

136. *Id.* at 189.

137. *Id.*

the need for probative evidence.”¹³⁸

The next novel privilege claim that the Supreme Court considered was the psychotherapist-patient privilege in *Jaffe v. Redmond*.¹³⁹ While applying the same analytical framework as it did in *University of Pennsylvania*,¹⁴⁰ the Court took a more liberal approach in recognizing a psychotherapist-patient privilege. *Jaffe* presented the Court with an opportunity to “kill two birds with one stone.”¹⁴¹ Not only could the court address the conflict among the circuit courts regarding a psychotherapist-patient privilege, but it could also address the conflict regarding the correct approach to use in evaluating novel privilege claims under FRE 501.¹⁴² Unfortunately, the Court failed to clearly resolve either conflict. By creating an undefined privilege that extends to licensed social workers, the Court may have unwittingly caused more confusion about the application of the privilege. In addition, “[t]he Supreme Court’s liberal methodology in *Jaffe* conflicts with the Court’s more conservative earlier decisions, making the Court’s approach to novel privilege claims under Rule 501 even more unclear.”¹⁴³ Although the Court may have muddied the waters regarding the scope of federal courts’ authority to develop privilege law, the Court’s recognition of a psychotherapist-patient privilege has also implicitly encouraged federal courts to be more open to new privilege claims.

IV. EXAMINATION OF A PARENT-CHILD PRIVILEGE

Support for a parent-child privilege did not develop until the late 1970s and early 1980s when a few courts¹⁴⁴ began to recognize the privilege and a number of law review articles supporting the privilege were published.¹⁴⁵ In the federal court system, only district courts in Nevada and Connecticut recognized the parent-child privilege until 1996.¹⁴⁶ At the state level, only four states currently provide any type of protection for parent-child communications. New York, the

138. *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

139. 518 U.S. 1 (1996).

140. 493 U.S. 182 (1990).

141. Svetanics, *supra* note 28, at 757.

142. *See id.*

143. *Id.*

144. *See, e.g., In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983); *People v. Fitzgerald*, 422 N.Y.S.2d 309 (1979); *In re A & M*, 403 N.Y.S.2d 375 (1978).

145. *See Covey, supra* note 56, at 882-83; *see also* Ellen Kandoian, *The Parent-Child Privilege and the Parent-Child Crime: Observations on State v. DeLong and In Re Agosto*, 36 ME. L. REV. 59 (1984); Sanford Levison, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631 (1984).

146. *See In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983) (upholding both adverse testimonial and confidential communications parent-child privileges); *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982) (upholding parent-child privilege based on the free-exercise clause and Jewish law which forbids parents and children from testifying against each other).

only state with a judicially recognized parent-child privilege, found that a parent-child privilege exists based on the right to privacy found in the Constitution.¹⁴⁷ Many other state courts facing this issue have determined that it would be more appropriate if the legislature recognized the privilege.¹⁴⁸ This is the sole option for some states in which judicial expansion of privilege law is forbidden.¹⁴⁹ Idaho,¹⁵⁰ Minnesota¹⁵¹ and Massachusetts¹⁵² are the only states that have some

147. See *People v. Fitzgerald*, 422 N.Y.S.2d 309, 314 (1979).

148. See, e.g., *People v. Sanders*, 457 N.E.2d 1241, 1244-45 (Ill. 1983); *State v. Gilroy*, 313 N.W.2d 513, 518 (Iowa 1981); *People v. Dixon*, 411 N.W.2d 760, 762 (Mich. Ct. App. 1987); *Grussing v. KVAM Implement Co.*, 478 N.W.2d 200, 205 (Minn. Ct. App. 1991); *In re Gail D.*, 525 A.2d 337, 339 (N.J. Super. Ct. App. Div. 1987).

149. See, e.g., NEV. REV. STAT. § 49.015 (1997); OKLA. STAT. tit. 12, § 2501 (1997).

150. IDAHO CODE § 9-203(7) (1998).

Any parent, guardian or legal custodian shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party. Such matters so communicated shall be privileged and protected against disclosure; excepting, this section does not apply to a civil action or proceeding by one against the other nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other, nor does this section apply to any case of physical injury to a minor child where the injury has been caused as a result of physical abuse or neglect by one or both of the parents, guardian or legal custodian.

Id.

151. MINN. STAT. ANN. § 595.02(j) (West Supp. 1998).

A parent or the parent's minor child may not be examined as to any communication made in confidence by the minor to the minor's parent. A communication is confidential if made out of the presence of persons not members of the child's immediate family living in the same household. This exception may be waived by express consent to disclosure by a parent entitled to claim the privilege or by the child who made the communication or by failure of the child or parent to object when the contents of a communication are demanded. This exception does not apply to a civil action or proceeding by one spouse against the other or by a parent or child against the other, nor to a proceeding to commit either the child or parent to whom the communication was made or to place the person or property or either under the control of another because of an alleged mental or physical condition, nor to a criminal action or proceeding in which the parent is charged with a crime committed against the person or property of the communicating child, the parent's spouse, or a child of either the parent or the parent's spouse, or in which a child is charged with a crime or act of delinquency committed against the person or property of a parent or a child of a parent, nor to an action or proceeding for termination of parental rights, nor any other action or proceeding on a petition alleging child abuse, child neglect, abandonment or nonsupport by a parent.

Id.

152. MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1998).

An unemancipated, minor child, living with a parent, shall not testify before a grand

form of statutory parent-child privilege for children less than eighteen-years-old and their parents. This sparse judicial recognition or legislative codification of a parent-child privilege may have resulted from a historical, unwritten practice forbidding parents and children from being called to testify against each other.¹⁵³ As explained by one court addressing a parent-child privilege claim, “the paucity of authority on this topic may reflect a deep-seated sense of respect for the family on the part of state and federal prosecutors.”¹⁵⁴ This historical practice of not calling parents and children to testify against each other reflects the value that society has put on family harmony.¹⁵⁵ Some scholars propose that a parent-child privilege protects this interest by preserving a witness’ interest in freely choosing between her loyalty to her family member and her obligation to the state to testify.¹⁵⁶ Under this view, the privilege belongs to the witness and cannot be invoked by the other person involved in the communication.¹⁵⁷ This rationale is similar to that of the adverse spousal testimony privilege, which prevents a witness from being forced to testify against her spouse, but allows the witness to testify voluntarily over her spouse’s objection.¹⁵⁸

A. Arguments Previously Advanced in Support of a Parent-Child Privilege

1. *Legal Arguments.*—A legal argument frequently advanced in support of a parent-child privilege is that the failure to recognize such a privilege violates a litigant’s constitutional right to privacy.¹⁵⁹ This argument is based on Supreme

jury, trial of an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of said parent’s family and who does not reside in the said parent’s household. For the purposes of this clause the term “parent” shall mean the natural or adoptive mother or father of said child.

Id.

153. See Doug Most, *A Court Has Ears Inside the Home: Parent-Child Secrets Not Safe*, THE RECORD, (N.J.), Dec. 7, 1997 at A1.

154. *In re Grand Jury Proceedings (Unemancipated Minor Child)*, 949 F. Supp. 1487, 1491 (E.D. Wash. 1996). The court further explained that this sense of respect for the family is “a reflection of the common law in action, whereby prosecutors presume that such testimony would be subject to some sort of parent-child privilege.” *Id.*

155. See Kandoian, *supra* note 145, at 82. The author further explains that “[t]he law of parent-child privilege is perhaps undeveloped because the parent-child bond is so revered in our culture that the thought of using forced testimony of children to prosecute parents has traditionally been considered beyond the bounds of decency in the minds of even the most zealous prosecutors.” *Id.* at 82-83.

156. See Kandoian, *supra* note 145, at 76.

157. See *id.*

158. See *supra* notes 10-16 and accompanying text.

159. See, e.g., Yolanda L. Ayala & Thomas C. Martyn, Note, *To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter’s Privileges*, 9 ST. JOHN’S J. LEGAL COMMENT. 163, 175-76 (1993); Jeffrey Begens, *Parent-Child Testimonial Privilege: An Absolute Right or an Absolute Privilege?*, 11 U. DAYTON L. REV. 709, 724-27 (1986); Betsy Booth,

Court decisions recognizing fundamental family privacy rights.¹⁶⁰ In one unanimous Supreme Court decision,¹⁶¹ Justice Stevens explained how the constitutional right to privacy encompasses two distinct interests. These interests include the "individual interest in avoiding disclosure of personal matters" and a family or individual's interest "in the independence in making certain kinds of important decisions."¹⁶² Using this rationale and other Supreme Court decisions,¹⁶³ a few lower courts have recognized a parent-child privilege based on a constitutional right to privacy.¹⁶⁴ As the Federal District Court of Nevada explained in *In re Grand Jury Proceeding (Agosto)*:¹⁶⁵ "Testimonial privileges have been regarded as important safeguards of the right to privacy."¹⁶⁶ Recognizing a parent-child communications privilege and a testimonial disqualification for family members, the court stated:

While the government has an important goal in presenting all relevant evidence before the court in each proceeding, this goal does not outweigh an individual's right of privacy in his communications within the family unit, nor does it outweigh the family's interests in its integrity and inviolability, which spring from the rights of privacy inherent in the family relationship itself.¹⁶⁷

This privacy right argument was also persuasive to a New York Appellate Court when it found communications between family members were privileged since they fell under the constitutional right to privacy.¹⁶⁸

Despite these decisions, most courts have declined to find a parent-child privilege based on the constitutional right to privacy.¹⁶⁹ Critics of the privacy

Underprivileged Communications: The Rationale for a Parent-Child Testimonial Privilege, 36 SW. L.J. 1175, 1181-85 (1983); Sandlow, *supra* note 42, at 819-27; Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1, 13-24 (1982), at 13-24; Watts, *supra* note 17, at 600-05.

160. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (holding that the Constitution protects the sanctity of the family); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (holding, in part, that parents have the right to assume the primary role in decisions concerning the upbringing of their children); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (finding that parents have a constitutional right to send their children to parochial school); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (finding constitutional protection of family autonomy based on an expansive interpretation of the Fourteenth Amendment).

161. *Whalen v. Roe*, 429 U.S. 589 (1977).

162. *Id.* at 599-600.

163. See *supra* notes 158-59.

164. See, e.g., *In re Grand Jury Proceeding (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983); *In re Application of A&M*, 61 A.D.2d 426 (1978).

165. *In re Grand Jury Proceeding (Agosto)*, 553 F. Supp. at 1298.

166. *Id.* at 1310.

167. *Id.* at 1325.

168. See *In re A & M*, 403 N.Y.S.2d 375, 434-35 (N.Y. App. Div. 1978).

169. See, e.g., *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985); *In re Grand Jury*

right theory point out that the Supreme Court has been hesitant to broadly construe any family right to privacy and that even when such a right is recognized, the right is not absolute.¹⁷⁰ The theory is also problematic because the very notion of constitutional privacy rights has been criticized as lacking explicit textual support in the Constitution.¹⁷¹

A second constitutional argument offered to support a parent-child privilege is "that compelling testimony from a child will violate the tenets of the family's religious beliefs and infringe upon the free exercise right provided by the first amendment."¹⁷² Both early Jewish and Roman law barred family members from testifying against one another.¹⁷³ Jewish law is based on the Torah (the five books of Moses) and its interpretation (The Tradition).¹⁷⁴ One of the Torah's rules "specifically 'forbids a parent from testifying against his or her children.'"¹⁷⁵ Similarly, ancient Roman law also respected the family. "Early Roman law recognized the rule of *testimonium domesticum*, which mandated that parents, children, patrons, freedmen, and slaves could not be compelled to give testimony against each other."¹⁷⁶

This free exercise of religion argument was presented to the District Court for the Southern District of Texas. In *Port v. Heard*,¹⁷⁷ two Jewish parents refused to testify in grand jury proceedings against their seventeen-year-old son. The parents maintained that since "rabbinical law prohibits Jewish parents and children from testifying against one another in canonical proceedings,"¹⁷⁸ the First Amendment's guarantee of free exercise of religion mandates the recognition of a parent-child privilege.¹⁷⁹ More recently, this free exercise argument was advanced in the highly publicized Delaware case of Amy Grossberg, a nineteen-year-old woman accused of murdering her newborn child.¹⁸⁰ In a pre-trial motion to suppress a subpoena, Grossberg's parents argued that their Jewish religion forbade them from testifying against their daughter, and

Proceedings (Unemancipated Minor Child), 949 F. Supp. at 1490; *Diehl v. State*, 698 S.W.2d 712, 717 (Tex. Ct. App. 1985) (Levy, J., dissenting) (commenting that the majority completely ignored the right to privacy parent-child privilege argument forwarded to quash evidence).

170. See Schlueter, *supra* note 6, at 47-50.

171. See Kandoian, *supra* note 145, at 80.

172. Schlueter, *supra* note 6, at 50 (citations omitted).

173. See Watts, *supra* note 17, at 591-93.

174. See *id.* at 591-92.

175. *Id.* (quoting *In re Grand Jury Proceedings (Greenburg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579, 581 & n.6 (D. Conn. 1982)).

176. *Id.* at 592.

177. 594 F. Supp. 1212, 1215 (S.D. Tex. 1984).

178. *Id.* at 1218.

179. *Id.* at 1218-19. See also *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) at 582 (recognizing limited parent-child privilege based on the First Amendment).

180. See Todd Spangler, *Suspect's Folks May Be Forced to Tell All*, HARRISBURG PATRIOT & EVENING NEWS, Nov. 26, 1997, at B6.

they should not have to submit to interviews with prosecutors.¹⁸¹ The court rejected this argument, ruling that the prosecution has a right to interview the Grossbergs "to ensure a fair opportunity for rebuttal."¹⁸²

Opponents of the free exercise theory point out that it would be difficult to codify a parent-child privilege based on religious beliefs because of the possible conflict among religious values.¹⁸³ In addition, opponents argue that since the freedom to practice one's religion is not absolute, the need for reliable evidence in a trial would likely qualify as a compelling state interest supporting the denial of a parent-child privilege.¹⁸⁴

Another argument advanced by some litigants and scholars for the adoption of a parent-child privilege is that FRE 501 authorizes the judicial creation of new evidentiary privileges. Supporters of this expansive view argue that FRE 501's broad language "left the door open for the judicial adoption of privileges such as the parent-child privilege[]." ¹⁸⁵ Most courts have rejected this argument, taking a much more restrictive approach to the creation of new privileges.¹⁸⁶

2. *Social Policy Arguments.*—Many scholars maintain that a parent-child privilege works to help preserve the family and foster the parent-child relationship. They suggest that the single event of forcing a child or parent to testify against the other may irreparably harm the parent—child relationship.¹⁸⁷ Building upon this theory, others argue that strong family relationships that foster communication and family loyalty help prevent juvenile delinquency.¹⁸⁸ One commentator explained: "Parents bear almost complete responsibility for the early socialization of their children, and studies show that this early training is the most significant influence in the child's development of both a self image and an ability to interact with society."¹⁸⁹ Responding to this theory, critics argue that there is no empirical data showing that the recognition of a parent-child

181. *See id.*

182. Matthew Futterman, *Grossberg's Parents Must Give Testimony*, STAR LEDGER, Jan. 24, 1998, at 13.

183. *See* Schlueter, *supra* note 6, at 50.

184. *See id.* at 51-52.

185. Watts, *supra* note 17, at 606. The author continues by asserting that the legislative history behind the adoption of Rule 501 supports the proposition that a parent-child privilege should be recognized. The author refers to statements made by Representative Hungate immediately prior to the adoption of FRE 501:

Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase "governed by the principles of the common law as they may be interpreted . . . in light of reason and experience" is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.

Id. at 606-07 (citing 120 CONG. REC. 40, 891 (1974)).

186. *See supra* notes 47-51 and accompanying text.

187. *See* Covey, *supra* note 56, at 889.

188. *See, e.g.,* Ayala & Martyn, *supra* note 159, at 176-77.

189. Franklin, *supra* note 11, at 167 (citing ALAN COFFEY, THE PREVENTION OF CRIME AND DELINQUENCY 56 (1975)).

privilege promotes frank and confidential discussions between a parent and child.¹⁹⁰

Another social policy argument is based on the purported “natural repugnancy” of forcing a parent or child to testify against the other or to reveal confidential communications.¹⁹¹ Proponents of this theory suggest that people feel a natural revulsion to the idea of family members being forced to testify against each other.¹⁹² “[I]f there is one universal, indeed primeval, principle of morality, it is that one must not deliver one’s friends [or family members] to their enemies.”¹⁹³ Additionally, commentators often refer to totalitarian governments as a reminder of the consequences of unrestrained state power.¹⁹⁴ Critics reply that a parent-child privilege is not needed to restrain government power, as the natural repugnance of forcing a parent or child to testify against the other is sufficient to protect the parent-child relationship.¹⁹⁵

Somewhat related to this natural repugnancy theory is the view that forcing a parent or child to testify against the other harms the image of the judicial system. Supporters of this image theory “suggest that privileges should exist because they enhance public acceptance of the legal system.”¹⁹⁶ If citizens feel a natural repugnancy to the idea of parents and children testifying against each other, then these citizens will likely also be unhappy with and possibly unwilling to accept a legal system that employs such repugnant means.¹⁹⁷ Under this theory, the legal system as a whole ends up suffering the consequences of compelling a witness to testify against her child or parent because “[w]hether the witness succumbed to governmental pressure or refused to testify, the public could perceive the system as unfair.”¹⁹⁸

Another justification that focuses on the unfairness of forcing a parent or child to testify against the other is often referred to as the “Witnesses’

190. See Schlueter, *supra* note 6, at 53.

191. See Watts, *supra* note 17, at 611-13; see also *In re Grand Jury Proceedings* (Agosto), 553 F. Supp. 1298, 1305-06 (D. Nev. 1983).

192. See Covey, *supra* note 56, at 889.

193. *Id.* (quoting Peter Berger, Editorial, *Now, “Boat People” From Taiwan?*, N.Y. TIMES, Feb. 14, 1978, at 35, col. 4).

194. See Watts, *supra* note 17, at 611-12. The author states that “[t]he actions of totalitarian governments should serve as adequate reminders of the horrors which thrive when certain relationships are deemed subordinate to the state.” *Id.*

195. See Schlueter, *supra* note 6, at 54. “Few prosecutors are willing to incur public wrath and criticism for needless use of testimony of either a child or a parent against the other. In short, the fear of abuse is simply not sufficiently well-founded to justify the codification of a parent-child privilege and is certainly not grounds for blanket exclusion of otherwise reliable evidence.” *Id.*

196. *Developments in the Law*, *supra* note 10, at 1585.

197. See Doug Most, *Judge Upholds Subpoena For Grossberg Parents, Couple Must Talk to Prosecutors*, BERGEN RECORD, Jan. 24, 1998, at A2. The author reports how a “potential downside” to prosecutors forcing parents to testify against their children “is that a jury could hold it against [a prosecutor] for trying to turn the parents against [their children].” *Id.*

198. *Developments in the Law*, *supra* note 10, at 1585.

Dilemma.”¹⁹⁹ Proponents of this theory maintain that calling a parent or child to testify against the other creates a dilemma for the witness. The witness must either (1) testify truthfully and condemn the accused-relative, (2) testify falsely and commit perjury, or (3) refuse to testify and risk contempt.²⁰⁰ The consequences of putting a child in the position of choosing between loyalty to a parent and loyalty to the state are especially grave. “This would necessarily require the State to actively punish selflessness and loyalty which are inculcated into children by their families, their churches, and even the State itself, and not only where such values are deemed consistent with the State’s purposes.”²⁰¹ Additionally, a few commentators²⁰² and at least one court²⁰³ have suggested that by forcing a witness into such a dilemma, the legal system as a whole will suffer. Presumably, the legal system will suffer because the witness may be strongly motivated to commit perjury and thus provide the trier of fact with unreliable evidence.²⁰⁴ As one commentator explained, “the government often has considerably more to lose than to gain when it attempts to compel parental testimony. The situation presents great potential for harm to the child, to the parent, and to the legal system.”²⁰⁵

C. Analysis of Federal and State Court Decisions Rejecting a Parent-Child Privilege

Despite the various legal and social theories that have been offered in support of a parent-child privilege, the majority of federal and state courts faced with such a claim have declined to recognize the privilege. A few common factors are present in federal court decisions rejecting the privilege. The following case analyses are representative of the numerous examples of these factors. The first factor is the influence of the Supreme Court’s cautionary approach to the development of privilege law. In *Grand Jury Proceedings of John Doe v. United States*,²⁰⁶ the Tenth Circuit rejected a claim of parent-child privilege based on a minor’s constitutional right to free exercise of religion. In that case, a fifteen-year-old boy refused to testify about his mother before a grand jury, claiming that such testimony would violate the free exercise of his Mormon religious beliefs.²⁰⁷ After noting that a parent-child privilege was not recognized at common law²⁰⁸ and that the two federal district court decisions recognizing a parent-child

199. See, e.g., Watts, *supra* note 17, at 613-15.

200. See *id.* at 613.

201. Diehl v. State, 698 S.W.2d 712, 720-21 (Tex. Ct. App. 1985).

202. See Franklin, *supra* note 11, at 169; Kandoian, *supra* note 145, at 71.

203. See *In re Grand Jury Proceedings* (Agosto), 553 F. Supp. 1298, 1309-10 (D. Nev. 1983).

204. See *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 922 (1987).

205. Franklin, *supra* note 11, at 169.

206. 842 F.2d 244, 248 (10th Cir. 1988).

207. *Id.*

208. *Id.* at 246.

privilege had not been followed,²⁰⁹ the majority opinion observed the Supreme Court's reluctance to create new privileges and denied the boy relief.²¹⁰

In 1984, the Eleventh Circuit also relied on the Supreme Court's rationale when it heard an appeal from a district court's order forcing an adult witness to testify before a grand jury regarding the investigation of his father.²¹¹ The son claimed a common law parent-child privilege under FRE 501.²¹² The court noted that every other federal court of appeals that had considered a claim of a parent-child privilege had refused to recognize the privilege.²¹³ In addition, following the Supreme Court's rationale, the Eleventh Circuit noted that "[p]rivileges against forced disclosure' are 'exceptions to the demand for every man's evidence' and are 'not lightly created nor expansively construed, for they are in derogation of the search for truth.'"²¹⁴

A second common factor present in federal court decisions refusing to recognize a parent-child privilege is the idea that the privilege may be appropriate under other facts not presented to the court. This factor was present in the Sixth Circuit's rejection of a claim of parent-child privilege by a defendant whose emancipated adult son was subpoenaed to testify in grand jury proceedings.²¹⁵ The defendant argued that such a privilege was "analogous to the spousal privilege" as it "would serve the public interest in preserving the harmony and confidentiality of the parent-child relationship."²¹⁶ While acknowledging that it had the power to recognize new privileges under FRE 501, the court used a cautionary approach²¹⁷ to reject the privilege claim and noted that its "power must be used sparingly."²¹⁸ The court also specifically did not address situations involving unemancipated minors, noting that minors "generally require much greater parental guidance and support than do emancipated adults."²¹⁹

The Fourth Circuit also hinted that a parent-child privilege might be appropriate under different factual circumstances when the court rejected a twenty-nine-year-old son's claim of family privilege.²²⁰ The son maintained that he should not have to testify before a grand jury about his father's actions.²²¹ The

209. The decisions are *In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983); *In re Grand Jury Proceedings (Greenburg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982).

210. *In re Grand Jury Proceedings of John Doe*, 842 F.2d at 248.

211. *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (1984) (per curiam).

212. *Id.*

213. *Id.* at 817.

214. *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 709-10 (1974)).

215. *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985).

216. *Id.* at 1258.

217. See *supra* notes 52-53 and accompanying text.

218. *Ismail*, 756 F.2d at 1258.

219. *Id.*

220. *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982).

221. *Id.* at 818.

district court had committed the son for civil contempt after the son refused to answer questions before a federal grand jury.²²² Claiming a family privilege under FRE 501, the son turned to the Supreme Court's rationale in *United States v. Trammel*.²²³ In that case, the Court stated that "the intention of Rule 501 was 'not to freeze the law of privilege . . . [but] . . . rather was to provide the courts with the flexibility to develop rules of privilege on a case by case basis . . .'"²²⁴ The Fourth Circuit responded by focusing on the Supreme Court's ultimate decision in *Trammel* to narrow the scope of the marital testimonial privilege.²²⁵ This narrowing of an existing privilege seemed to convince the Fourth Circuit that the *Trammel* decision did not support the recognition of a new privilege.²²⁶ Even though the Fourth Circuit declined to recognize a family privilege under the specific facts of the case, the court qualified its decision by stating that "we do not endeavor to decide to what extent the age of the child and whether or not emancipation has occurred may or may not affect the decision as to whether any familial privilege exists."²²⁷

A third factor that has influenced federal courts' reluctance to create new privileges is state policy decisions regarding privilege law. Some courts have followed commentators' suggestions of turning to state decisions to help define the development of federal privilege law. As one commentator proposed:

Perhaps even more important than recognition of state-created privileges as a matter of comity in particular cases is the use of state privilege law as evidence of "reason and experience" in the formulation of federal privilege law under FRE 501. It is entirely appropriate for federal courts to evaluate state precedent for whatever light it might shed on sound principles.²²⁸

After noting that state courts or legislatures had declined to recognize a parent-child privilege, some federal courts have also declined to do so.²²⁹

Most state courts have also refused to recognize a parent-child privilege. While some courts have reasoned that privileges should be discouraged since they exclude relevant evidence from a judicial proceeding,²³⁰ other state courts have found that a policy decision that recognizes a new evidentiary privilege is

222. *Id.*

223. 445 U.S. 40 (1980).

224. *Jones*, 683 F.2d at 818 (quoting *Trammel*, 445 U.S. at 47.)

225. *Id.*

226. *Id.*

227. *Id.* at 819.

228. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 172 (2d. ed. 1994).

229. *See In re Grand Jury*, 103 F.3d 1140, 1147-48 (3d Cir. 1997); *Port v. Heard*, 764 F.2d 423, 430 (5th Cir. 1985).

230. *See, e.g., State v. Willoughby*, 532 A.2d 1020, 1022 (Me. 1987) *State v. Maxon*, 756 P. 2d 1297, 1298-99 (Wash. 1988).

better left to the legislature.²³¹ Additionally, some state courts have declined to recognize a parent-child privilege because they assert that the "Wigmore test"²³² has not been satisfied.²³³

D. Recent Developments in Reaction to the Jaffe Decision

Since the Supreme Court's decision in *Jaffe*, two federal courts addressing the issue have differed on whether *Jaffe* supports the recognition of a federal parent-child privilege. Six months after *Jaffe*, the District Court for the Eastern District of Washington held that as a matter of first impression, federal law recognizes a privilege protecting confidential communications between a parent and child.²³⁴ In *In re Grand Jury Proceedings (Unemancipated Minor Child)*,²³⁵ an unemancipated minor child filed a motion to quash a subpoena that required him to testify before a grand jury. The child, his mother and father, and others were targets of the grand jury investigation. The child claimed that a parent-child privilege protected him from having to testify against his parents.²³⁶

After concluding that there was an insufficient basis for recognizing a parent-child privilege based on the constitutional right of privacy,²³⁷ the court turned to the common law. The court examined prior federal court decisions and noted that only one federal court of appeals had specifically addressed the issue of "whether a minor, unemancipated child can be compelled to testify before a grand jury regarding communications made by a parent with whom the child resides."²³⁸ The court also noted that while other circuit courts may have ruled on this issue, they had not clearly revealed the specific factual circumstance under which the privilege was rejected.²³⁹ Because three federal courts had pointedly left open the question of whether a parent-child privilege might exist based on facts not presented,²⁴⁰ the court concluded, "there is no blanket

231. See, e.g., *People v. Dixon*, 411 N.W.2d 760, 763 (Mich. Ct. App. 1987); *State v. Bruce*, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983).

232. See *supra* notes 57-64 and accompanying text.

233. See, e.g., *In re Inquest Proceedings*, 676 A.2d 790, 792-93 (Vt. 1996); *Maxon*, 756 P.2d at 1301-02.

234. *In re Grand Jury Proceedings (Unemancipated Minor Child)*, 949 F. Supp. 1487, 1494, 1497 (E.D. Wash. 1996).

235. *Id.* at 1488.

236. *Id.*

237. *Id.* at 1491.

238. *Id.* at 1491-92 (citing *In re Grand Jury Proceedings of John Doe*, 842 F.2d 244 (10th Cir. 1988) (holding that no parent-child privilege existed to allow a fifteen-year old boy to testify before a grand jury against his mother)).

239. *Id.* at 1492 (citing *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir. 1984) (per curiam)); *In re Matthews*, 714 F.2d 223 (2nd Cir. 1983); *In re Grand Jury (Starr)*, 647 F.2d 511 (5th Cir. 1981) (per curiam)).

240. *In re Grand Jury Proceedings (Unemancipated Minor Child)*, 949 F. Supp. 1487, 1492 (E.D. Wash. 1996).

prohibition against a parent-child privilege."²⁴¹ The court also suggested that "the reluctance of prosecutors to subpoena parents and minor children to testify against each other is, in reality, a reflection of the common law in action, whereby prosecutors presume that such testimony would be subject to some sort of parent-child privilege."²⁴²

The court next turned to the *Jaffe* decision. Using *Jaffe's* analytical framework, the court concluded it could recognize a parent-child privilege if "there is a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth,' and [if] the privilege serves public ends."²⁴³ After determining that "[b]oth reason and experience mandate the recognition of some form of a parent-child privilege,"²⁴⁴ the court explained that similar to other currently recognized privileges (attorney-client, priest-penitent, and physician-patient), the parent-child relationship is "rooted in the imperative need for confidence and trust."²⁴⁵ Asserting that there is "no meaningful distinction between the policy reasons behind the marital communications privilege and those behind a parent-child privilege,"²⁴⁶ the court decided that children and parents should not be dissuaded from communicating with each other.²⁴⁷ Rather, "in light of this society's increasing concern with the weakening of the family structure, such communication and parental guidance should be encouraged, not discouraged, by the judiciary."²⁴⁸ Despite the court's recognition of a parent-child privilege for confidential communications, the court declined to apply the privilege to the facts presented, holding that the minor child had failed to make a sufficient factual showing to justify application of the privilege.²⁴⁹

One month later, in another case of first impression, the Third Circuit relied on the *Jaffe* decision to uphold two district court rulings.²⁵⁰ In a split decision, the Third Circuit refused to become the first federal court of appeals to recognize a parent-child privilege.²⁵¹ This case involved the consolidation of appeals from two separate cases. The first was a Virgin Islands case in which a grand jury subpoenaed the father of an investigation target.²⁵² His son was under investigation for alleged transactions that had taken place when the son was

241. *Id.* at 1493.

242. *Id.* at 1491.

243. *Id.* at 1493 (quoting *Jaffe v. Redmond*, 518 U.S. 1, 11 (1996)).

244. *Id.* at 1494.

245. *Id.*

246. *Id.*

247. *Id.* at 1494-95.

248. *Id.* at 1495.

249. *Id.* at 1497.

250. *In re Grand Jury*, 103 F.3d 1140 (3rd Cir. 1997) (consolidating appeal docket Nos. 95-7354, 96-7529 and 96-7530, one from the District Court of the Virgin Islands, the other two a case involving the same person from the District Court of Delaware).

251. *Id.*

252. *Id.* at 1142.

eighteen-years-old. The father was a former FBI agent who moved to quash the subpoena because he believed he was going to be questioned about prior confidential conversations he had with his son. The father claimed that the conversations were privileged from disclosure under FRE 501.²⁵³ In asserting that testifying against his son would negatively impact their relationship, the father explained:

I will be living under a cloud in which if my son comes to me or talks to me, I've got to be very careful what he says, what I allow him to say. I would have to stop him and say, "you can't talk to me about that. You've got to talk to your attorney." It's no way for anybody to live in this country.²⁵⁴

The district court denied the quashing of the father's subpoena and the father appealed.²⁵⁵

The second case involved a sixteen-year-old minor who was subpoenaed by a grand jury to testify regarding an investigation of her father.²⁵⁶ The grand jury was investigating her father's participation in the kidnapping of a woman. Counsel for the daughter and her mother, along with counsel for the father, filed a motion to quash the subpoena. The motion sought to protect confidential communications and to bar testimony of the daughter.²⁵⁷ The district court denied the motion, but the daughter refused to testify and was found in contempt.²⁵⁸ The district court then stayed the imposition of sanctions until after the hearing on the appeal.²⁵⁹ The appellants argued that:

recognition [of a parent-child privilege] is necessary in order to advance important public policy interests such as the protection of strong and trusting parent-child relationships; the preservation of the family; safeguarding of privacy interests and protection from harmful government intrusion; and the promotion of healthy psychological development of children.²⁶⁰

Responding to these arguments, the Third Circuit declined to recognize a privilege for confidential communications because: (1) the overwhelming majority of both federal and state courts have rejected such a privilege; (2) no reasoned analysis of FRE 501 or of standards established by the Supreme Court supported recognition; (3) such a privilege did not meet Wigmore's four requirements and would have no impact on the parental relationship; and (4) while acknowledging its authority to recognize a new privilege, such recognition

253. *Id.* at 1143.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 1143-44.

259. *Id.* at 1144.

260. *Id.* at 1146 (citations omitted).

should be left to Congress.²⁶¹

The Third Circuit began its analysis by noting that eight federal courts of appeals²⁶² had specifically rejected a parent-child privilege and that the remaining federal courts of appeals that had considered the issue had chosen not to recognize the privilege under the particular facts presented.²⁶³ Similarly, the majority of state courts addressing the issue²⁶⁴ had also declined to recognize a common-law parent-child privilege.²⁶⁵ While noting that two federal district courts²⁶⁶ had recognized some form of parent-child privilege, the court asserted that the limited holdings of both cases were distinguishable and not authoritative.²⁶⁷

Turning to the language of FRE 501, the Third Circuit stated that the purpose behind the rule was "to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change."²⁶⁸ The court also noted that in *Jaffe*, the Supreme Court had reaffirmed the maxim that "privileges are generally disfavored."²⁶⁹ Upholding this maxim, the Third Circuit explained how this generally disfavored status of privileges has influenced both its decisions and those of the Supreme Court, resulting in rare expansion of common-law testimonial privileges.²⁷⁰

The Third Circuit also focused on *Jaffe*'s reliance on the policies of the states. The court distinguished the parent-child privilege from the

261. *Id.* at 1146-47.

262. See *In re Erato*, 2 F.3d 11 (2d Cir. 1993); *In re Grand Jury Proceedings of John Doe*, 842 F.2d 244 (10th Cir. 1988); *United States v. Davies*, 768 F.2d 893 (7th Cir. 1985); *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985); *In re Grand Jury Subpoena (Santarelli)*, 740 F.2d 816 (11th Cir. 1984) (per curiam); *United States v. Jones*, 683 F.2d 817 (4th Cir. 1982); *In re Grand Jury Proceedings (Starr)*, 647 F.2d 511 (5th Cir. 1981) (per curiam); *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980) (en banc).

263. *In re Grand Jury*, 103 F.3d 1140, 1147 (3rd Cir. 1997).

264. See, e.g., *In re Terry W.*, 130 Cal. Rptr. 913 (1976); *Marshall v. Anderson*, 459 So. 2d 384 (Fla. Dist. Ct. App. 1984); *People v. Sanders*, 457 N.E.2d 1241 (Ill. 1983); *Gibbs v. State*, 426 N.E.2d 1150 (Ind. Ct. App. 1981); *Cissna v. State*, 352 N.E.2d 793 (Ind. Ct. App. 1976); *In re Inquest Proceeding*, 676 A.2d 790 (Vt. 1996).

265. See *In re Grand Jury*, 103 F.3d at 1147.

266. See *In re Grand Jury Proceedings (Agosto)*, 553 F. Supp. 1298 (D. Nev. 1983); *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) 579 (D. Conn. 1982).

267. *In re Grand Jury*, 103 F.3d at 1148. The court explained how *In Re Grand Jury Proceedings (Agosto)*, 553 F. Supp. at 1298, "conflicts squarely with its own circuit's en banc precedent [rejecting privilege]" and how *In re Grand Jury Proceedings (Greenberg)*, 11 Fed. R. Evid. Serv. (Callaghan) at 579, only recognized a limited "privilege grounded in the First Amendment free exercise clause; however, the court declined to recognize a general common-law parent-child privilege." *In re Grand Jury*, 103 F.3d at 1148-49.

268. *In re Grand Jury*, 103 F.3d at 1149 (citing *Trammel v. United States*, 445 U.S. 40, 47 (1980)) (internal quotation omitted).

269. *Id.*

270. *Id.*

psychotherapist-patient privilege by noting that while all fifty states recognize a psychotherapist-patient privilege, only four states have any type of privilege for parents and children.²⁷¹ The Third Circuit further explained how *Jaffe* had placed significance on the inclusion of the psychotherapist-patient privilege among the nine privileges recommended to Congress in the Proposed Rules of Evidence.²⁷² The court distinguished this from the parent-child privilege, which was not among the recommended privileges.

The Third Circuit chose to evaluate the claims of parent-child privilege using Dean Wigmore's approach. Applying Wigmore's four criteria, the court concluded that two of the requirements for creation of a federal common law privilege were not met.²⁷³ The court determined that "confidentiality—in the form of a testimonial privilege—is not essential to a successful parent-child relationship, as required by the second factor."²⁷⁴ Essentially, the court was not convinced that the existence of a privilege influences a parent or child's decision to share confidences.²⁷⁵ In evaluating Wigmore's fourth factor,²⁷⁶ the court concluded, "any injury to the parent-child relationship resulting from non-recognition of such a privilege would be relatively insignificant" while the cost would be substantial.²⁷⁷ Additionally, the court seemed concerned that recognition of a parent-child privilege would require forcing a parent to remain silent, even if the parent wanted to testify.²⁷⁸ The court was unwilling to create such a privilege, and therefore believed that the only option would be to create a privilege that could be waived by a parent.²⁷⁹ This option was also rejected by the court because it concluded that if a parent could waive the privilege, then the goal of the privilege would be destroyed since the child would not be able to predict with certainty that her confidences would not be shared. The court ultimately determined that the creation of new privileges should be left to Congress, as it is better suited to evaluate public policy considerations.²⁸⁰

Dissenting in part from the Third Circuit majority opinion, Judge Mansmann noted how the consolidated appeals actually involved different parent-child

271. *Id.* at 1150 ("New York state courts have recognized a limited parent-child privilege, and Idaho and Minnesota have enacted limited statutory privileges protecting confidential communications by minors to their parents. In Massachusetts, . . . minor children are statutorily disqualified from testifying against their parents in criminal proceedings.") (citations omitted).

272. *Id.* at 1151.

273. *Id.* at 1152.

274. *Id.*

275. *Id.* at 1153.

276. See WIGMORE, *supra* note 57, § 2285. "The injury that would inure to the relation by the disclosure must be *greater than the benefit* thereby gained for the correct disposal of the litigation." *Id.* (emphasis in original).

277. *In re Grand Jury*, 103 F.3d at 1153.

278. *Id.*

279. *Id.* at 1153-54.

280. *Id.* at 1154-55.

privilege claims.²⁸¹ While the Virgin Islands appeal involved a privilege claim to protect "confidential communications made by a child in the course of seeking parental advice," the Delaware appeal concerned a teenaged daughter's claim of privilege to prevent her from being forced to testify adversely against her father.²⁸² Judge Mansmann concluded that the court should recognize a limited privilege protecting confidential communications made to a parent by a child seeking guidance.²⁸³

Asserting that it "is time to chart a new legal course,"²⁸⁴ Judge Mansmann turned to *Jaffe* and noted how the Supreme Court had reinforced the federal "courts' role in fostering evolution in the area of testimonial privilege."²⁸⁵ She maintained that the rationale of the spousal confidential communications privilege (preserving family harmony) also supports the recognition of an analogous parent-child privilege. After examining the crucial role that the parent-child relationship plays in a child's development, Judge Mansmann concluded, "the public good to be derived from a circumscribed parent-child privilege outweighs the judicial system's interest in compelled parental testimony."²⁸⁶

V. ASSERTION THAT FEDERAL COURTS SHOULD RECOGNIZE A PARENT-CHILD PRIVILEGE

Federal courts should recognize a qualified parent-child privilege. The Supreme Court's recent decision in *Jaffe* adds further support to the legal and social policy arguments that have previously been advanced regarding a parent-child privilege. The liberal approach to privileges used by the Supreme Court in *Jaffe* should assure federal courts of their authority to develop privilege law under FRE 501. The influence of this liberal approach is evident by the recent recognition of a parent-child privilege by the District Court for the Eastern District of Washington.²⁸⁷ That court used the *Jaffe* framework²⁸⁸ to correctly

281. *Id.* at 1157 (Mansmann, J., dissenting in part).

282. *Id.* at 1158 n.1.

283. *Id.* at 1158.

284. *Id.*

285. *Id.* at 1159.

286. *Id.* at 1165.

287. *In re Grand Jury Proceedings (Unemancipated Minor Child)*, 949 F. Supp. 1487 (E.D. Wash. 1996).

288. *Id.* at 1493. The court explains the *Jaffe* framework:

This framework begins with the "primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." Guided by "reason and experience," the Court may recognize exceptions to this general rule where there is a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth, and where the privilege serves public ends."

conclude that “reason and experience” mandate the recognition of a parent-child privilege. As the District Court for the Eastern District of Washington also noted, the rationales justifying the currently recognized marital privileges and the psychotherapist-patient privilege support recognition of a parent-child privilege.²⁸⁹ One commentator explained the similarity between the marital and parent-child privileges:

The child-parent relationship resembles the husband-wife relationship in that both involve a fundamental and private family bond. The child-parent relationship ideally encompasses aspects found in the marital relationship—mutual love, intimacy and trust. . . . The fact that the child-parent relationship is part of the institution of the family that it is hoped is promoted by a marital privilege makes the protection of children’s private conversations with parents even more appealing.²⁹⁰

Regarding the rationale underlying the psychotherapist-patient privilege (to foster mental health) it is illogical to require a child to bypass talking with her parents and seek professional help in order for her communications to be protected.²⁹¹ As Justice Scalia explained in his dissent in *Jaffe*: “Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.”²⁹²

The *Jaffe* decision should not only assure federal courts of their authority to recognize a parent-child privilege, but it should also encourage state legislatures to recognize the privilege. *Jaffe* specifically relied on the policy decisions of all the states (recognizing a psychotherapist privilege) to conclude that “reason and experience” required recognition of a federal psychotherapist-patient privilege.²⁹³ State legislatures should note the Supreme Court’s rationale and be proactive in developing parent-child privileges.²⁹⁴

The importance of the parent-child relationship in promoting the healthy emotional development of children and preventing juvenile delinquency is another reason why our judicial system should recognize a parent-child privilege.

Id. (citations omitted).

289. *Id.* at 1494. See also Ayala & Martyn, *supra* note 159, at 178-80; Watts, *supra* note 17, at 608-09.

290. Stanton, *supra* note 159, at 6-7; see also Comment, *The Child-Parent Privilege: A Proposal*, 47 FORDHAM L. REV. 771 (1979).

291. See Stanton, *supra* note 159, at 13. See also Steven P. Garmisa, *You and the Law*, CHI. SUN TIMES, Mar. 11, 1997. The author gives the following advice to parents in talking with their kids: “So hug your kids. Tell them you love them. And give them a Miranda warning before they say anything incriminating.” *Id.*

292. *Jaffe v. Redmond*, 518 U.S. 1, 22 (1996) (Scalia, J., dissenting).

293. *Id.* at 12.

294. See *Family Privilege, Opinion*, SALT LAKE TRIB., June 9, 1997, at A8. The author suggests that recognition of a family privilege is “another issue in which the states must show the federal government the way to better public policy.” *Id.*

Parent-child relationships are fundamentally different from other relationships. The distinguishing characteristic of a parent-child relationship is the idea of intimacy, or the "concept of caring which makes the sharing of personal information significant."²⁹⁵ Intimacy "involves a fundamental sharing of identity"²⁹⁶ that results in a "shared sense that 'we' exist as something beyond 'you' and 'me.'"²⁹⁷ It is intimacy that creates the unique bond between a parent and child that is lacking between a professional and a patient. Under the *Jaffe* framework, this intimacy helps to foster both private and public good. Not only is a child's development positively influenced, but by fostering a child's positive value system, society benefits as a whole.

The intimate relationship between a parent and child is also why a parent-child privilege is supported by the non-instrumental rationale for privileges. Critics are correct when they maintain that the existence of a parent-child privilege will not encourage parents and children to talk with each other. It is the intimacy between a parent and child that encourages such communication. This is the main reason why courts that have applied Wigmore's instrumental approach to a claim of parent-child privilege have declined to recognize the privilege. While a parent-child privilege would likely not encourage future communications, it should still be recognized because of its likely effect on the parent-child relationship *after* the privilege has been invoked. Critics of a parent-child privilege (and supporters of Wigmore's approach) mistakenly focus their inquiry on how a parent-child privilege impacts the relationship between a parent and child *before* invocation of the privilege.²⁹⁸ By permitting a parent or child to refuse to testify against the other, the privilege works to maintain and protect the existing relationship between a parent and child. "[W]ithout the privilege, the parent-child relationship will 'survive,' but will arguably not thrive to the degree necessary to perform its valued societal functions of teaching and child rearing, and maintaining a stable family situation."²⁹⁹ If a parent has been compelled to testify against her child, will that child feel secure enough to turn to the parent in a future time of need? In addition, even if a parent or child is unaware of the existence of a specific privilege, that parent or child may still believe and expect that communications will be kept confidential.³⁰⁰ "[T]he fact that the relationship does not arise in anticipation of confidentiality does not in itself preclude the importance of confidentiality. Once the family comes into

295. *Developments in the Law*, *supra* note 10, at 1589 (quoting Jeffrey H. Reiman, *Privacy, Intimacy and Personhood*, 6 PHIL. & PUB. AFF. 26, 33-34 (1976)).

296. *Id.*

297. *Id.* (quoting Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980)).

298. The Third Circuit made the mistake of applying Wigmore's instrumental approach in its recent rejection of a parent-child privilege claim. See *In re Grand Jury*, 103 F.3d 1140 (3d Cir. 1997).

299. Patrick Koepp, *A Parent-Child Testimonial Privilege: Its Present Existence, Whether it Should Exist, and To What Extent*, 13 CAP. U. L. REV. 555, 565 (1984).

300. See Booth, *supra* note 159, at 1180 (footnote omitted).

being, confidentiality becomes crucial.”³⁰¹

The respect individuals have for the intimate relationship between a parent and child is also reflected in the natural repugnancy that many feel when a parent or child is forced to testify against this other. This natural repugnance supports the recognition of a parent-child privilege, especially because the intimate relationships between parents and children are increasingly at risk of being harmed by our judicial system. At one time the frequency at which parents were called to testify against their children was so low that one commentator called the practice “ingenious if not ingenuous.”³⁰² Today, the erosion of the “unwritten rule” against calling a parent or child to testify against the other is evident in recent media reports of parents challenging subpoenas and even choosing to spend time in jail rather than testify against a child. In Burlington, Vermont, Arthur and Geneva Yandow chose to spend forty-one days in jail rather than comply with a district court order to answer certain questions about their son.³⁰³ Their twenty-five-year-old son, Craig, was under investigation for the rape and murder of a twenty-three-year-old young woman. The Yandows refused to answer questions about their son’s appearance when he returned home on the night of the murder and about what he had shared with them concerning the night’s events.³⁰⁴

The parents of a suspect in another high profile murder case also initially refused to testify against their child. In that case, Amy S. Grossberg and her high school sweetheart, Bran C. Peterson, Jr., were charged in Delaware for allegedly murdering their newborn son. Grossburg’s parents filed a motion to quash subpoenas requiring them to testify against their daughter, but Delaware Superior Court Judge Henry duPont Ridgely denied the motion, rejecting their claim of parent-child privilege.³⁰⁵ After Judge Ridgely denied their motion, the Grossbergs reluctantly answered the prosecutor’s questions about what their daughter confided in them regarding her newborn son’s death.³⁰⁶

While these incidents of parents refusing to testify against their children have created some controversy, the situation that has sparked the most recent debate regarding the merits of a parent-child privilege involves some of the most shocking and disputed allegations of this decade.³⁰⁷ In late January of 1998,

301. Sandlow, *supra* note 42, at 828.

302. Kandoian, *supra* note 145, at 83 (quoting Comment, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1027-28.)

303. See Barry Siegel, *Choosing Between Their Son and the Law*, L.A. TIMES, June 13, 1996, at A1. See also *Couple Who Refused to Testify Released After Son Charged in Rape*, MILWAUKEE J. SENTINEL, May 9, 1996, at 14; Wilson Ring, *Couple Jailed for Refusing Order to Testify Against Son*, PEORIA J. STAR, April 6, 1996, at A10, available in 1996 WL 6959816.

304. See Siegel, *supra* note 303.

305. See Futterman, *supra* note 182.

306. See Doug Most, *Grossbergs Questioned in Baby-Death Case*, BERGEN RECORD, Feb. 21, 1998, at A3.

307. See *Pieces of the Puzzle*, CHI. SUN TIMES, Jan. 23, 1998, at 3.

allegations that President Bill Clinton had a sexual relationship with Monica Lewinsky, a former White House intern, resulted in a media frenzy that brought the merits of a parent-child privilege into the national spotlight. To investigate these allegations, Independent Counsel Kenneth Starr called Marcia Lewis, Monica Lewinsky's mother, to testify in front of a federal grand jury about any conversations that Monica had with her mother regarding the President. Ms. Lewis was forced to testify after Kenneth Starr granted her immunity from prosecution. After two days of testimony, a visibly shaken Ms. Lewis broke down and was unable to continue testifying. The grand jury hearings were continued and Ms. Lewis left the courtroom in a wheelchair. She later asked U.S. District Court Judge Norma Holloway to excuse her from having to return to continue her testimony before the grand jury, but Judge Holloway rejected Ms. Lewis' request.³⁰⁸

The sight of this distraught mother renewed the debate over a parent-child privilege.³⁰⁹ Numerous newspaper articles, editorials, and television talk shows examined the topic.³¹⁰ In addition, Ken Starr's tactics motivated United States Senator Patrick Leahy to introduce legislation that asks the U.S. Judicial Conference to examine the merits of a parent-child privilege.³¹¹ Similar legislation has been introduced in the United States House of Representatives.³¹² This legislation would amend FRE 501 and create a parent-child privilege to protect confidential communications. The National Association of Criminal Defense Lawyers (NACDL) is also calling for the adoption of a parent-child privilege. Recognizing that a parent-child privilege would "promote and protect the important family values of trust and open communication between parent and child," the NACDL is calling on Congress and state legislatures to enact a statutory parent-child communication privilege.³¹³ In advocating the propriety

308. See John M. Broder, *Monica Lewinsky's Mother Fails in Bid to End Testimony*, N.Y. TIMES, March 26, 1998, at A16.

309. See *id.* The author notes how Marcia Lewis' ordeal "provoked sympathy from millions of Americans and criticism of independent counsel Kenneth Starr's tactics." *Id.* See also Daniel J. Capra, *Laws of Evidentiary Privilege*, N.Y. LAW J., May 8, 1998, at 3, col. 1. The author explains how "[t]he absence of any parent-child privilege became a matter of public and political outcry when Independent Counsel Kenneth Starr subpoenaed Monica Lewinsky's mother to testify before the District of Columbia Grand Jury." *Id.*

310. See, e.g., *Mother and Witness Painful or Not, Marcia Lewis' Testimony is Important*, Editorial, PITTSBURGH POST-GAZETTE, Feb. 18, 1998, at A14; Margaret Carlson, *Should a Mom Rat on Her Daughter?*, TIME, Feb. 23, 1998, at 25; Lance Gay, *Starr Seen as Threat to Families Calling Lewinsky's Mother to Violate Daughter's Privacy Leaves Sour Taste with Many*, ROCKY MOUNTAIN NEWS, Feb. 15, 1998, at 3A; Ruth Marcas, *Starr's Tactics Trouble Some Prosecutors*, SEATTLE TIMES, Feb. 14, 1998, at A2; Adrienne T. Washington, *Starr Out of Bounds with Monica's Mother*, WASHINGTON TIMES, Feb. 24, 1998, at C2; Eric Zorn, *With Ma On Stand, Lawyers Can Mine the Mother Lode*, CHI. TRIB., Feb. 12, 1998, at 1.

311. See S. 1721, 105th Cong. (1998).

312. See H.R. 3577, 105th Cong. (1998).

313. National Association of Criminal Defense Lawyers, *Need for Parent/Child Privilege*,

of a parent-child privilege, the NACDL has specifically mentioned the United States Supreme Court's decision in *Jaffe*.³¹⁴ The NACDL's proposed privilege would protect confidential communications between a parent and child and would prevent each from testifying over the other's objection.³¹⁵

Independent Counsel Kenneth Starr's decision to force Marcia Lewis to testify against her daughter has also prompted three state legislatures to consider legislation that would create some type of parent-child privilege. In California, State Representative Zoe Lofgren introduced a bill entitled the "Confidence in the Family Act."³¹⁶ This legislation provides "that a witness cannot be compelled to testify in federal civil or criminal proceedings against his or her parent or child."³¹⁷ In New Jersey, state Senator Richard Codey introduced legislation that would create a privilege prohibiting "prosecutors from forcing parents to testify against their children."³¹⁸ In Illinois, State Representative Daniel Burke is sponsoring legislation that would make it less likely in civil proceedings for a parent or child to be forced to testify about confidential statements made to one another.³¹⁹

Paralleling this backlash against the erosion of the unwritten rule against calling parents and children to testify against each other is the explosion of juvenile crime arrest rates over the past decade.³²⁰ Although the juvenile crime rate has fallen for the first time during the past two years, there is still concern that the number of juvenile crimes will continue to increase. "Census projections reflect a growth in the juvenile population in the United States of nearly 20 percent between 1990 and 2010. Even if juvenile arrest rates do not continue to grow, the overall number of juvenile crimes committed likely will be dramatically higher in the next 20 years."³²¹ Increasing juvenile crime rates

22-APR CHAMPION 10, 10-11, Feb. 1998.

314. *Id.* "[T]he United States Supreme Court has gone beyond traditional common law privileges and has recently recognized an evidentiary privilege for communications between a social worker psychotherapist and a patient." *Id.* at 11.

315. *See id.*

316. H.R. 3577, 105th Cong. (1998).

317. Robert W. Peterson and Gerald F. Uelmen, Commentary, *Starr's Legacy May Include a New Privilege Law: Compelling Monica Lewinsky's Mother to Testify Has Spawned Calls for Protecting Parent-Child Communications*, L.A. TIMES, Apr. 23, 1998, at B9.

318. Kathy Barrett Carter, *Democrats Seek Ban on Prosecutors Pitting Parents Against Kids, Family Communications Would Be Privileged*, STAR-LEDGER, Feb. 24, 1998, at 29.

319. *See* Dennis Conrad, *Bill is Reaction to Lewinsky's Mother's Testimony, Woman Forced to Testify About Allegations Daughter Had Affair with President*, PEORIA JOURNAL STAR, March 21, 1998, at B6, available in 1998 WL 5758410.

320. *See Rate of Crime Drops*, TIMES UNION, Aug. 21, 1996 at A12, available in 1996 WL 9554778. "In 1980 the arrest rate for juvenile crime was about 340 arrests for every 100,000 youths aged 10 through 17. By 1994 it had reached a high of about 525 arrests before falling off in 1995 to 510 arrests for each 100,000 juveniles." *Id.*

321. James C. Backstorm, *Housing Juveniles in Adult Facilities: A Common-Sense Approach*, CORRECTIONS TODAY, June 1, 1997 at 20, available in 1997 WL 10514028; *See also*

create more opportunities for prosecutors to call parents to testify against their children. This increased opportunity, combined with the erosion of the practice of not calling parents and children to testify against each other, shows how parents and children need a parent-child privilege now more than ever.

Our judicial system should recognize a limited parent-child privilege. The family member who is being asked to testify should hold the privilege. Both parent and child witnesses should be able to invoke the privilege, as "[c]ompelled parent-child testimony can be just as crushing to families when a child betrays a parent as when a parent betrays a child."³²² The privilege should apply not only to confidential communications, but also to adverse testimony. Similar to the marital privileges, with one protecting confidential communications and the other prohibiting forced adverse spousal testimony, a parent-child privilege should also have two components. Additionally, the adverse testimony privilege should protect the conduct of a parent or child that has been observed by the other.

The privilege should apply to all children, including adult children, as the relationship between parents and children is one that should always be fostered. "Sociological research has debunked the commonly espoused notion that parents and adult children in America typically lose contact and become relatively unimportant to each other."³²³ Compared to a marital relationship that may be legally ended or a professional relationship that ends when services are complete, a parent-child relationship usually endures for many years. "Although spouses may separate and friends may drift apart, parents and children characteristically remain available to each other in times of need."³²⁴

The privilege should be limited by permitting voluntary testimony of a parent or child. Similar to the rationale behind the adverse spousal testimony privilege (permitting voluntary testimony) if a parent or child is willing to testify against the other, then the relationship is likely not one that needs to be fostered. A parent may believe it is in her child's best interests for the parent to testify, and in that situation, the judicial system should respect the parent's choice.

The use of a case-by-case balancing approach would also limit the application of the privilege. This would help calm fears that recognizing a parent-child privilege is the first step down the "slippery slope" of encouraging privilege claims based on various other close relationships. A balancing approach should weigh the potential evidentiary significance of the matter sought against the interests protected by the privilege. These interests include protecting

Teen Crime Rate Down Nationwide, NEWS & OBSERVER, Aug. 9, 1996, at A5, available in 1996 WL 2891879. United States Attorney General Janet Reno explained, "[t]he arrest rate for children aged 10 to 17 declined 2.9 percent in 1995 and the arrest rate for murders by juveniles dropped 15.2 percent in 1995 and was down 22.8 percent since 1993. . . . These rates are still far too high. The number of juveniles over the next 15 years will increase significantly." *Id*

322. Note, *Parent-Child Loyalty and Testimonial Privilege*, 100 HARV. L. REV. 910, 925 (1987).

323. *Id.* at 918.

324. *Id.* at 919.

and maintaining the intimate parent-child relationship, preventing public repugnance at the judicial system, and preventing a witness from having to choose between loyalty to a parent or child and perjury.³²⁵ By abandoning Wigmore's traditional utilitarian justification, a more flexible approach to privileges could be used to permit a judge to take into consideration many different factors such as the need for protected evidence, the nature of the relationship between the parent and child, the possible disruption of the relationship in question, and the nature of the particular case.³²⁶ A judge should also consider whether the parent and child are opposing parties in legal proceedings and whether the communications involved planning a future fraud or crime. If either of these situations is present, the judge should not recognize the privilege. Additionally, an uncertain balancing approach may induce litigants to try to obtain the evidence elsewhere to avoid the cost of litigating the issue of a parent-child privilege.³²⁷ An *in camera* screening of the evidence is also a possibility.³²⁸ While such a screening may invade a litigant's privacy to some degree, litigants would likely still prefer this small invasion to the current system, which provides no protection for communications between a parent and child.

CONCLUSION

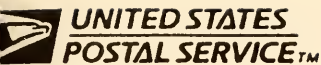
The Supreme Court's recent decision in *Jaffe* makes the arguments for a federal parent-child privilege stronger than ever. By using a liberal approach of privilege law in recognizing a psychotherapist-patient privilege, *Jaffe* affirms federal courts' authority to recognize new privileges under FRE 501 and lends support to numerous legal and social policy arguments that have been repeatedly advanced by litigants, courts and scholars during the last twenty years. The recent public outcry against Independent Counsel Kenneth Starr's decision to force Marcia Lewis to testify against her daughter lends even further support for the creation of a parent-child privilege. Federal courts should recognize a qualified parent-child privilege that uses a balancing approach to determine if the privilege should be applied in a particular judicial proceeding. Such a privilege would still recognize the maxim that all relevant evidence should be placed before the trier of fact, but it would also protect the intimate relationship between a parent and child and prevent our judicial system from making the mistake of pursuing the truth at too high a cost.

325. See *id.* at 926.

326. See Margaret A. Berger, Comment, *The Privileges Article in the New York Proposed Code of Evidence*, 47 BROOK. L. REV. 1405, 1410 (1981).

327. See *id.* at 1489-90.

328. See *Developments in the Law*, *supra* note 10, at 1489-91 (citing Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 483-84 (1977)).



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